INDEX

CITATIONS

Cases: Page

Bogash v. *Baltimore Cigarette Service*, 193 F. 2d 291 ... 25
Burhans v. *Montgomery Ward & Co.*, 110 F. Supp. 184 .. 24, 25
Chrysler Corp. v. *Smith*, 297 Mich. 438, 298 N. W. 87 .. 19
Duncan v. *Montgomery Ward & Co.*, 42 F. Supp. 879 .. 24, 25
Farmers Reservoir and Irrigation Co. v. *McComb*, 337 U. S. 755 ... 20
Federal Trade Commission v. *Goodyear Co.*, 304 U. S. 257 ... 3
Kirschbaum Co. v. *Walling*, 316 U. S. 517 ... 4
McComb v. *Jacksonville Paper Co.*, 336 U. S. 187 ... 6
McComb v. *Frank Scerbo & Sons*, 177 F. 2d 137 ... 5
Mitchell v. *Joyce Agency, Inc.*, 348 U. S. 945 ... 3
Mitchell v. *T. F. Taylor Fertilizer Works*, 233 F. 2d 284 ... 22
Mitchell v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427 ... 3, 20
National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261 ... 3
Overstreet v. *North Shore Corp.*, 318 U. S. 125 ... 20
Phillips Co. v. *Walling*, 324 U. S. 490 ... 2, 10, 11, 12, 14, 15, 16, 18, 25
Spielmann v. *Industrial Comm.*, 236 Wisc. 240, 295 N. W. 1 ... 19
Tobin v. *Aibel*, 112 F. Supp. 156, affirmed, 204 F. 2d 376 ... 20, 21
United States v. *W. T. Grant Co.*, 345 U. S. 629 ... 5
United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 ... 3, 4
Walling v. *Haile Gold Mines*, 136 F. 2d 102 ... 10
Walling v. *Helmerich & Payne*, 323 U. S. 37 ... 2, 3
Walling v. *O'Grady*, 146 F. 2d 422 (C. A. 2) ... 5
Walling v. *James Reuter, Inc.*, 321 U. S. 671 ... 2, 3, 4

Statutes: Page

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.*:

Section 3 (j) 20
Section 13 (a) (1) 11
Section 13 (a) (2) 11, 22
Section 13 (a) (4) 22, 23, 24
Section 16 (b) 6
Section 16 (c) 5, 6
Section 17 ..... 5, 6

Miscellaneous:

29 C. F. R. 617.5 21
29 C. F. R., 1956 Supp. 541.1 (e) 13
95 Cong. Rec. 11004 16
95 Cong. Rec. 11216, 14942 23
95 Cong. Rec. 12502 16
95 Cong. Rec. 12505 18
95 Cong. Rec. 14877 16
95 Cong. Rec. 14928–14935 23
95 Cong. Rec. 14932 ..... 17, 23
Revised Rules of the Supreme Court, Rule 19 (1) (b) .. 2

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 122

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BEKINS VAN AND STORAGE COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY TO THE BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner respectfully submits that respondent's representation of the facts and the issues is so at variance with the Government's understanding of them, and respondent's mistaken references to legislative, administrative and judicial statements or decisions are so numerous, as to require considerable unravelling, clarification and correction in order to assure consideration of the legal issue presented by the Government's petition in its accurate factual and legal content.

In particular, respondent's claim that Congress by the 1949 Amendments intended to change entirely the

purpose and scope of the exemption "as it existed when the *Phillips* case was decided" (Br. in Opp., pp. 20–21) contradicts its attempt to minimize the general significance of the issue, and, we submit, serves to establish the need for review by this Court. For, since *Phillips* was the leading decision settling the application of the "retail establishment" exemption prior to the 1949 Amendments, the effect of those amendments upon the *Phillips* decision plainly presents "an important question of federal law which has not been, but should be, settled by this court" (Revised Rules of the Supreme Court, Rule 19 (1) (b)).

I.

Respondent's reliance upon "subsequent developments" (Br. in Opp., pp. 7–8) assumes that the result of its recently executed agreement with the union will be to bring about full or substantial compliance with the statutory requirements so far as the issues in this particular case are concerned. Not only is this factual assumption erroneous, but, even if true, respondent has misapprehended the legal effect of such belated compliance as well as the injurious effect of an unreviewed erroneous decision of general scope on the rights of employees and on the public interest in effective enforcement of the Fair Labor Standards Act.

A. Significantly, respondent refrains from asserting that its new agreement renders the case moot, evidently because it recognizes that such a claim is wholly untenable, even if it be assumed that the effect of the agreement will bring respondent into substantial compliance with the Act. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *James V. Reuter, Inc.*, 321

U. S. 671; *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945; *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427; see also *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. These decisions have settled beyond doubt that the discontinuance of violations, whether by voluntary agreement (*Helmerich & Payne*), or by completion of the work involved in the particular litigation (*Vollmer*), or by dissolution of the corporate employer (*Reuter and Joyce Agency*), does not moot the controversy.

These same decisions also establish that such subsequent developments do not diminish the need for review by this Court of issues of public interest and importance, and, in particular, of lower court decisions erroneously interpreting provisions of the Fair Labor Standards Act which have general application. The Court has repeatedly granted review and proceeded to adjudication, notwithstanding voluntary cession or abandonment of the practices sought to be enjoined by the Government, even under circumstances where the evidence of abandonment of the practices was much more convincing and reliable than that offered by respondent here.

As shown *infra*, pp. 6–9, the subsequent developments, on which respondent relies, fall far short of assuring future compliance with the Act by respondent. But of at least equal importance is the plainly undiminished need for review in the interest of effective administration and enforcement of the Act

generally. As this Court has repeatedly recognized from the inception of this Act, its effective administration and enforcement is peculiarly dependent upon authoritative judicial determination. For this Act, unlike many other federal regulatory statutes (such as "the Interstate Commerce Act and the National Labor Relations Act and other legislation") does not provide "a preliminary administrative process for determining whether the particular situation is within the regulated area," but "puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations" (*Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 523). It is therefore only through adjudication of particular controversies that the statute's applicability can be settled and its requirements made effective.

With proper enforcement of the Act so dependent upon judicial settlement of disputed issues, the general principles established more than half a century ago in *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, *supra,* and repeatedly reaffirmed, apply with special force to this type of litigation. A defendant should not be permitted to use his voluntary or self-willed conduct as "an effectual means to prevent the judgment of this court," or to foreclose assertion of public rights "by the Government as a substantial trustee for the public under the act of Congress" (*United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. at 309), or to frustrate the Government's right of "pursuit to completion of the prescribed appellate procedure" (*Walling* v. *James V.*

Reuter, Inc., 321 U. S. at 676). These principles apply "in fuller measure in furtherance of the public interest * * * than if only private interests were involved" (*Id.* at 674–675), and particularly where there is a "public interest in having the legality of the practices settled" (see *United States* v. *W. T. Grant Co.,* 345 U. S. 629, at 632).

The special need for final judicial settlement of disputes over this Act's applicability has been greatly increased by the enactment, in the 1949 Amendments, of an important new remedy for the collection of unpaid wages. Section 16 (c) of the 1949 Amendments authorizes the Secretary, upon written request from any employee, to bring an action to recover the amount of his claim "*Provided,* That *this authority to sue shall not be used* by the Secretary *in any case involving an issue of law which has not been settled finally by the courts,* and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary if it does involve any issue of law not so finally settled" (63 Stat. 919, emphasis added). This provision was enacted as a substitute for the previously recognized jurisdiction of the courts to order restitution of unpaid wages in an injunction action by the Administrator under Section 17 (*Walling* v. *O'Grady,* 146 F. 2d 422 (C. A. 2); *McComb* v. *Frank Scerbo & Sons,* 177 F. 2d 137 (C. A. 2)), Section 17 being specifically amended to deprive the courts of jurisdiction to order payment of unpaid wages in an injunction action. In so conditioning this important restitution remedy, Congress evidently presupposed that general issues of law would be settled

by the courts, in advance, through injunction actions (like the instant action) by the Government under Section 17. Thus, as long as erroneous lower court decisions of general scope, rendered in Section 17 actions, are left unreviewed by this Court, employees are deprived of their most effective remedy for collecting unpaid wages due them.[1]

B. The facts of the instant case demonstrate the need for final settlement by this Court of the issue here involved, not only for the purpose of general enforcement of the Act, but also, despite respondent's contrary assertion, for adequate assurance against continued non-compliance by this particular employer.

In the first place, the issue is not limited, as respondent implies (Br. in Opp., p. 38), solely to a single building out of its 35 or more. The decision's impact extends currently to some, and potentially to many, other warehouses in this huge enterprise, because of the fast changing character of respondent's business. The Alameda warehouse itself, which is the subject of this suit, was originally located in a residential section and served largely as a storage warehouse for residents in the neighborhood. At that time, probably it, too, may have qualified for exemption as a retail establishment. But the change in its environment brought about a change in the character of its

[1] While the employee has an additional remedy, under Section 16 (b) of the Act, to institute his own suit, this remedy, as this Court has recognized, depends "on such whimsical or fortuitous circumstances" that it is plainly an inadequate method for effective enforcement of the Act (*McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 194). The enactment of Section 16 (c) evidences legislative recognition of this inadequacy.

business, so that this warehouse admittedly is no longer used exclusively or essentially for storage of household goods, but now serves the surrounding area which "consists entirely of a heavy industrial and commercial neighborhood" (Fdg. 16, R. 41). The record shows that the Figueroa warehouse, which is also included in the same Division, is rapidly developing into an "office record center" for storage of the files and records of the various companies in the downtown area adjacent to Figueroa Street, and is also being adapted for rental of storage space to "customers who need blocks of 5,000 foot space" (R. 130). The record also shows that similar non-retail functions are being conducted at the Wilshire warehouse, and that the proportion of retail household storage at the Crenshaw warehouse is declining (R. 130–131). At the present time (since the investigation which led to this action took place almost 4 years ago), in all likelihood, the Figueroa warehouse, and perhaps others of respondent's warehouses, are so extensively engaged in non-retail functions that they may no longer qualify for the exemption.

Nor is the significance of the issue with respect to this particular employer removed by the new union contract. The contract, which respondent claims will meet the statutory overtime requirements, does not afford any assurance whatsoever of compliance with the record-keeping requirements of the Act, which are obviously basic to any effective enforcement of the substantive wage-and-hour requirements. In addition, the contract apparently does not cover office employees (office employees were not included in the

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prior union contract, R. 20–30). Respondent erroneously states (Br. in Opp., p. 25) that the Government has conceded that the office employees are exempt. There has been no such concession. As pointed out in our petition (p. 16, fn. 3), no issue was raised as to the status of office employees because respondent was complying with respect to these employees at the time suit was instituted, but the decision below obviously now invites non-compliance with respect to these employees.

Moreover, the union contract clearly does not afford the effective protection against non-compliance which the statutory remedies provide. Both the Government and the employees are entitled to the shield of these more effective deterrents which Congress has deliberately provided—including stringent penalties for violation of an injunction or for willful violation after judicial determination that respondent is not exempt. Also, employees are entitled to know what their minimum rights are, as distinguished from what they must bargain for. It is obviously unfair, and contrary to the legislative intent, to compel employees to continue indefinitely to bargain over the minimum statutory requirements. Even the court below pointedly rejected respondent's contention that the union, being a strong one, should be relied upon to protect the employees' rights. As the decision below states, the employer and the union "cannot get together and set aside the positive policy of the act" (Pet. App., p. 28).

And even if it be assumed that the contract provides sufficient assurance of compliance at least for its three-year term, the facts of this case well illustrate

the inadequacy of such a limited term in the face of an outstanding unreviewed decision which approves and invites non-compliance. The time necessarily consumed in investigating and preparing a case for legal action, and in prosecuting the litigation to completion, frequently exceeds three years.[2] An employer may thus reap the benefits of non-compliance for five or six years, or more, before a final judicial determination of his responsibility under the Act can be secured. In the instant case the investigation which formed the basis for this suit was conducted in 1952 and early 1953, and, according to the usual procedure, covered respondent's operations for the preceding two years beginning January 1, 1950. Suit was filed January 27, 1954. Respondent admittedly was not in compliance with either the overtime or the record-keeping requirements of the Act during all this time and continuing throughout the pendency of the suit in both the District Court and the Court of Appeals. So far as appears, respondent is still not in compliance with the record-keeping requirements, and was not in compliance with the overtime requirements at least up to the time of the new union contract in April 1956—a period of at least 6½ years.

[2] Government enforcement procedure and litigation is necessarily a rather protracted process. Not only is there a lapse of time before violations are brought to the attention of the enforcement agency, but the time must be taken to investigate, and in most cases to negotiate for voluntary compliance. This is in addition to the time consumed in taking the necessary steps to prepare the case for legal action, and even further delay is often encountered because of the crowded condition of many court dockets and the delay necessarily incident to appellate review.

Under all these circumstances, we submit that there is a clear and present need for final settlement of the continuing controversy as to the applicability of the Act. Respondent should not be left free, in reliance upon the decision below and without the restraint of the statutory deterrents, to continue or resume at will its non-compliance. Not only is there a need for "determination of [the] question of law to serve as a guide to the public agency which may be called upon to act again in the same matter," but the possibility of future noncompliance by respondent "is very much with us and not merely within the realm of prophecy." See *Walling* v. *Haile Gold Mines,* 136 F. 2d 102, 105 (C. A. 4). An adjudication by this Court in the instant case is needed to resolve the continuing controversy between respondent and the Government, and to "obviate the need for, and the expense of, repetitious litigation in the future * * *" (*Ibid.*).

II.

Respondent's assertion that the significance of the decision below is "largely limited to the facts in this case" (Br. in Opp., p. 35) is equally untenable, as is evident from the broad grounds on which respondent seeks to defend the decision. Only by a persistent disregard of the limited purpose of the retail establishment exemption, and by ignoring the fact that recognition of its limited purpose was the controlling and fundamental ground for this Court's decision in the *Phillips* case, 324 U. S. 490, can respondent minimize the significance of the issue.

Section 13 (a) (2), said this Court, "is the offspring of a manifest desire to exclude from the scope of the Act 'business in the several States *that is of a purely local nature*' * * * Congress was interested in exempting those regularly engaged in *local retailing* activities and those employed by small *local retail establishments,* epitomized by the corner grocery, the drug store and the department store * * * Section 13 (a) (2) is a part of the Act *only* because of the fear that Section 13 (a) (1) in exempting employees regularly engaged in a 'local retailing capacity,' did not clearly exclude those employed by *local retailers who are situated near state lines and who make occasional interstate sales*" (*Phillips,* 324 U. S. at 497, emphasis added). It was "the *small local retailers,* who were the sole concern of Congress in Section 13 (a) (2)" (*Id.* at 498, emphasis added).

Obviously, the extensive multi-unit, multi-function, "divisions" into which respondent has organized its huge enterprise do not even approximate the description of "small local retailers" doing business of "a purely local nature except for occasional interstate sales" due to "location near State lines" (see 324 U. S. at 497–498). By no stretch of the imagination can the group of five large warehouses constituting the "division" at issue in this case be so characterized. Respondent's emphasis on the "division" as "the smallest functional unit of the Company" serves only to emphasize that the "functional unit" is not the type of "establishment" contemplated by the exemption. For, like the warehouse and central office in the *Phillips*

case, the "division" is undeniably engaged regularly and extensively in functions "in the very midst of the stream of interstate commerce" requiring that it "constantly deal with both incoming and outgoing interstate shipments"—functions "completely unlike those pursued by employees of the small local retailers, who were the sole concern of Congress in Section 13 (a) (2)" (324 U. S. at 497–498).

Respondent's attempt to represent the issue here as an insignificant dispute over a mere artificial, unrealistic "physical location" doctrine, based solely "upon the single fact that the Alameda building is geographically separate" (Br. in Opp. p. 14), reflects both a distortion of the facts and of the physical-separateness principle itself. The physical-separateness principle evolved out of the very real problem of applying an exemption, clearly intended for the limited purpose of exempting local retail activities, to large multi-function interstate enterprises which are plainly engaged extensively in activities other than local retailing. The problem presented by such large "hybrid" organizations was how to make the exemption available to the legitimate local retailing business without doing violence to the limited purpose of the exemption. It was this plainly realistic approach that led to the conclusion in *Phillips* that the "physically distinct" unit is "the essential key to the problem" (324 U. S. at 495–496).

It is a fact that the physically-separate units of such a chain organization are separate *functionally* to a marked degree, as well as geographically. Respond-

ent's physically-separate warehouses are no less functionally separate than the units of the typical chain organization, and it is a gross exaggeration to say that the "only identity which the Alameda building has * * * is that it is geographically separate" from the other warehouses of the division (Br. in Opp. p. 6). Each warehouse is not only located in a separate building but has its own equipment specially adapted to the type of warehousing carried on at the particular unit. The type of warehousing carried on by each differs in accordance with its location, the adaptability of its space, and the nature of its customers. Each has its own regular crew of employees and its own separate supervising foreman.[3] It is indeed the difference in the functions of the various units, which derives in large measure from their physical location, which affords a realistic basis for applying the exemption without doing violence to its limited purpose.

Neither the fact that the physically-separate unit may fail to have the degree of functional separation to operate as a completely separate business, nor the fact that it may be closely integrated with other units for purposes of more efficient and economical record-keeping and general management of the enterprise,

[3] The fact that the foreman performs some manual work does not, contrary to respondent's apparent implication (Br. in Opp. p. 6), detract from his status as a supervisor or executive. The stipulated facts and the findings of the trial court make it clear that he manages the warehousing functions of his unit (Stip. R. 13–14; Fdg. 13, R. 39–40). Respondent's attempt to minimize his supervisory control is hardly consistent with the stipulated fact that he is exempt from the Act as an "executive." See 29 CFR, 1956 Supp. 541.1 (e).

can be determinative of its status as a separate establishment. The Alameda warehouse is functionally no more integral a part of the "division" than the *Phillips* central office and warehouse was an integral part of that company's retail outlets. The *Phillips* company, like the respondent here, relied heavily on its functional and organizational integration, and argued, in almost the precise words used by respondent, that "whether or not an establishment, great or small, is a 'retail establishment' depends, *not on the physical location of its units, but on the character of its business*" and that its sales outlets, warehouses and office constituted an integrated operation "*as if all these activities were confined in one building*" (*Phillips* Supreme Court Br. pp. 11–12, emphasis added; compare Br. in Opp. pp. 13–14). Although this Court expressly recognized that the functions of the offices and warehouses were "completely meshed" and "integrated" with those of the sales outlets (324 U. S. at 494–495), it deliberately rejected *Phillips'* argument and adopted the physical-separateness test.

In practical effect, respondent's point is that an enterprise should be free to determine for itself, by its own administrative practices and organization, what constitutes the "establishment" and that the percentage tests are then to be applied to whatever segment (regardless of size, number of units, and variety of functions performed) which the company wishes to label as the "establishment." That this would allow the enterprise virtually complete freedom so to distribute its extensive non-retailing functions as to secure the exemption for the entire (or a large

part of the) enterprise, contrary to the plain purpose of the exemption, is evident from the facts of the instant case. As the record here shows, self-interest alone, which rests largely on factors wholly irrelevant to the purpose of the exemption, determines what "the smallest business or operating unit" of an enterprise is. Prior to 1938, for example, all of respondent's warehouses in the entire metropolitan area of Los Angeles were operated as a single organizational unit (R. 66). The reach of the retail establishment exemption, with its specific and limited objective, cannot depend upon such managerial choices.

III.

Respondent's argument on the effect of the 1949 Amendments (Br. in Opp., pp. 20–22) betrays the hollowness of its denial that the decision below is inconsistent with *Phillips,* for in this argument respondent openly rests its defense of the ruling below on the assumption that the basic purpose of the original exemption has been entirely changed since *Phillips.* This postulate is specifically and flatly contradicted by the legislative history of the 1949 Amendments. While the 1949 amendment to this exemption was intended to expand it to the limited extent of allowing a retail establishment more leeway in making non-retail sales without losing the exemption, the sponsors of the amendment emphatically disavowed any intent to change or expand *the basic purpose or type of establishment*—as described in *Phillips*—for which the exemption was originally designed. Rep-

resentative Lucas, who sponsored the amendment in the House, declared that it would do no more than confirm "the exemption for the various local neighborhood businesses whom it was the original purpose of the existing law to exempt" (95 Cong. Rec. 11004). Similarly, Senator Holland, who sponsored the amendment in the Senate, explained that it would have "the effect of confirming the exemption for the various local neighborhood businesses which it was the original purpose of the existing law to exempt" (95 Cong. Rec. 12502). It was likewise expressly stated in the report of the majority of the Senate Conferees that "the conference agreement exempts establishments which are *traditionally* regarded as retail" (95 Cong. Rec. 14877, emphasis added). The illlustrations repeatedly used in the discussion of the amendments were the same as those employed in the legislative explanation of the original enactment (referred to in *Phillips*), *i. e.* "the grocery stores, the hardware stores, the clothing stores", etc. (95 Cong. Rec. 11004, 12502). And to obviate any doubt of its acceptance and approval of this Court's view of the purpose of the exemption, the *Phillips* decision was specifically confirmed (see Government's Pet., pp. 12–13). Moreover, this specific approval expressly and particularly adopted the *Phillips* definition of the term "establishment" (see Pet., pp. 12–13).

The excerpt which respondent quotes from the Statement of the House Managers (Br. in Opp., p. 21), when read in the context of the immediately preceding sentences, patently contradicts the broad

inference which respondent purports to draw. The immediately preceding sentences read as follows:

> Paragraph (2) of section 13 (a) of the conference agreement does not exempt large mail-order houses which make most of their sales to out-of-State customers. *Nor does it exempt warehouses and central offices of chain-store systems.* The employees in such warehouses and central offices are *not employed "by" any single retail or service establishment* in the chain *but rather by the chain itself.* [95 Cong. Rec. 14932, emphasis added.]

The sentence quoted by respondent, as is evident from its very opening words, is simply contrasting the limited situation of a warehouse operated by and servicing "*exclusively*" a "single" exempt retail or service establishment (emphasis added). In a subsequent paragraph on the same page of the House Managers Report, the restricted intent of the word "by" is further explained—*i. e.*, to make clear that employees employed and working exclusively for a single exempt retail establishment are within the exemption "even though they may do most of their work outside the establishment," such as "bill collectors, outside repair and service men, outside salesmen, merchandise buyers, consumer survey and promotion workers and delivery men" (*Ibid.*).

The remaining quotations from Senator Holland, on which respondent relies, are unrelated to the question of what constitutes the retail "establishment." Senator Holland was addressing himself to an explanation of the phrase "recognized as retail sales or services"

for purposes of determining whether the retail establishment meets the requirement that 75 percent of its sales of goods or services "is not for resale and is recognized as retail sales or services in the particular industry." That respondent's quotations from Senator Holland do not carry the implication of expanding the meaning of the term "establishment" is evident from the Senator's answer to the explicit question: "What effect would this amendment have upon chain stores?" Senator Holland's answer was as follows:

> It leaves them in *exactly the same position as they are today.* Their warehouses and central offices would continue to be subject to the act. The individual branch stores, however, would continue to be exempt [he was obviously assuming, of course, that the stores met the specific retail and intrastate sales percentage requirements of the amended exemption]. This was the holding of the United States Supreme Court in *Phillips* v. *Walling* (324 U. S. 490), and *there is no intent in the proposed amendment to change such holding.* [95 Cong. Rec. 12505; emphasis added.]

IV.

Respondent's reliance upon decisions construing State unemployment compensation statutes reveals the extent of the departure by the decision below from the purpose of the exemption here in issue. Both the statutory policy and the context of the term "establishment" as used in the State unemployment statutes are so dissimilar from the present problem that this Court, in the *Phillips* case, did not even feel it necessary to

mention the decisions on which respondent here relies, although both the petitioner (A. H. Phillips, Inc.) and the American Retail Federation, *amicus curiae,* relied on *Chrysler Corp.* v. *Smith,* 297 Mich. 438, 298 N. W. 87, and *Spielmann* v. *Industrial Comm.,* 236 Wisc. 240, 295 N. W. 1 (cf. Br. in Opp., pp. 32–33).[4]

The term "establishment" in the unemployment compensation statutes is in the context of a disqualification of unemployment due to a labor dispute "at the establishment" (nine States) or "at the factory, establishment or other premises" (majority of the States) at which the claimants are employed. Even if it be assumed that a broad interpretation of the term "establishment" is warranted under the policy of these statutes[5] to prevent the use of unemployment funds in support of strikes or labor disputes, the reason underlying such broad interpretation is palpably inapplicable, and indeed diametrically opposed, to the limited purpose of the retail establishment exemption in the Fair Labor Standards Act. In the one case the statutory policy to disqualify unemployment due to labor disputes might well be frustrated by ignoring the practical fact that, normally, a labor dispute in one unit leads to unemployment in related units of a functionally integrated enterprise. On the other hand, the functional integration of a large multi-function enterprise, which admittedly is engaged extensively in interstate and non-retail functions, is scarcely a sound

[4] Compare brief for A. H. Phillips, Inc., pp. 7–8 and brief of American Retail Federation, p. 18.

[5] But see the strong dissenting opinion in the *Chrysler* case, 297 Mich. at 454–476.

reason for broad interpretation of an exemption designed only to exempt "small local retailers, who were the sole concern of Congress in Section 13 (a) (2)" of the Fair Labor Standards Act (324 U. S. at 498).

As this Court has repeatedly cautioned, the coverage of this Act is to be liberally construed and its exemptions strictly interpreted, regardless of decisions construing different statutes, even though the other statutes may be "similar." See *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 131; *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427. If decisions construing "similar" federal statutes are not applicable, it cannot be gainsaid that decisions construing completely dissimilar State statutes are clearly inapposite. Indeed, the Court has held, in a decision under this Act, that the same word may not mean the same thing each time it is used, even though in the same statute, but must be construed in its particular context. See *Farmers Reservoir and Irrigation Co.* v. *McComb*, 337 U. S. 755, where the word "produced" in the agriculture *exemption* was held to have a different and more limited meaning than the definition of "produced" for *coverage* purposes in Section 3 (j).

V.

Respondent's reliance on *Tobin* v. *Aibel*, 112 F. Supp. 156 (E. D. N. Y.) affirmed 204 F. 2d 376 (C. A. 2) (Br. in Opp., p. 23), which it cites in support of its contention that "petitioner itself has conceded" that physical separation is not determinative of a separate establishment (Br. in Opp., p. 23), reflects the same disregard for context and purpose. The issue in

Tobin v. *Aibel* related to the application of an administrative regulation designed to protect the Act's standards by prohibiting the use of home workers in the knitted outerwear industry. This regulation broadly defined the industry *for the purpose of including all operations* in it, regardless of the division of parts of the industry among particular employers. Thus, it covered not only "knitting" but the "further manufacturing, dyeing or other finishing" of articles of knitted outerwear which are "partially or completely manufactured in the same establishment as that where the knitting process is performed" (29 C. F. R. 617.5).

The defendants in that case (a man and his wife) were engaged in the production of hairnets which are made from a knitted fabric. They sought to avoid the regulation by dividing the work between two entities (a corporation and a partnership) and by designating a physically-separate location for the distribution and collection of the homework. The issue was whether the defendants should be allowed to evade the Administrator's regulation by this simple device. The decision to disregard the physical separation of the distribution point was thus no more than a practical realistic recognition that the establishment where the knitting and partial manufacturing were performed was the same establishment using the homeworkers, and that the separate distribution point was simply a device to evade the plain purpose of the regulation. That decision has no relevance whatsoever in determining the meaning of "establish-

ment" as used in the wholly different context of the Section 13 (a) (2) exemption.

The other decisions on which respondent relies also serve to emphasize that the decision below, by its disregard for the purpose of the exemption, has expanded the exemption to unlimited and unprecedented potentialities and that there is a need for another authoritative decision by this Court. In particular, the recent case of *Mitchell* v. *T. F. Taylor Fertilizer Works*, 233 F. 2d 284 (C. A. 5) demonstrates that "the possibilities of abuse" inherent in a loose construction of the term "establishment," which Congress foresaw and expressly undertook to forestall (see our Pet., pp. 18–20), are already in the process of being realized.

Respondent describes this as the case "which is the closest on its facts to the instant case that we have found" (Br. in Opp., p. 17). The Fifth Circuit there held that a fertilizer mixing plant located in the industrial part of Moultrie, Georgia, was simply an adjunct to a general sales office located five blocks away in the business district, and that the plant and sales office were "functionally an entity" and constituted a single exempt retail establishment under Section 13 (a) (2) and the new Section 13 (a) (4) added by the 1949 Amendments. 233 F. 2d at 286. This decision, like the decision below, rejected the "distinct physical place of business" concept in favor of the "functional" integration standard, with the result that the separate fertilizer processing plant, which, if not an ordinary

factory was certainly a substantial processing enterprise uncharacteristic of a typical retail establishment, was held exempt as an adjunct to a retail sales office. This is not only contrary to the terms of Section 13 (a) (4) which limits the processing aspects of the exemption to "processes at the retail establishment," but is directly opposed to the expressed legislative assurances that this section was not intended, and could not reasonably be construed, to exempt "manufacturing establishments, as such," "merely because such establishments have, or create, a retail outlet," and that "The section does not permit the tail to wag the dog" (95 Cong. Rec. 11216, 14942).[6]

[6] That the *Taylor* decision is an unwarranted expansion of the exemption is clear from the Statement of House Managers accompanying the Conference Report on H. R. 5856 (Rept. No. 1453, Oct. 17, 1949, 95 Cong. Rec. 14928–14935) listing among the conditions upon which the exemption depends: "Third, the goods which the exempt establishment makes or processes must be made or processed *at the establishment which sells the goods*" (emphasis added). That this was not intended to refer to a geographically-separate processing plan is evident from the specific examples cited in which the exemption might apply "despite the fact that there is a physical dividing line between the manufacturing portion of an establishment and the selling portion *such as a partition, wall*, etc. For example, a bakery will meet the test even though it bakes its bread and pastries *in a back room* and sells same in *a front room of its establishment*. This exemption will apply typically to bakery establishments which bake the breads and pastries which they sell, ice plants which manufacture the ice they sell, and ice cream parlors or candy kitchens which make their own ice cream or candy" (95 Cong. Rec. 14932, emphasis added).

While we believe the *Taylor* decision to be erroneous, no petition for certiorari has been filed in that case because the peculiar nature of the fertilizer business and the special character of Taylor's operations are not thought to be sufficiently

In any event, there is a marked contrast between the multi-unit, multi-function "divisions" of respondent's enterprise and Taylor's two-unit business consisting of a processing plant serving exclusively its *single local retail sales outlet*. It is equally plain that respondent's extensive non-retail functions, unlike Taylor's fertilizer processing, are not performed as an incident to respondent's local retail sales or services, but are of a distinctive character adapted to the needs of its *non-retail* customers, and unrelated to its retail services except for the fact that they are combined in a "hybrid" enterprise.

The other decisions upon which respondent relies afford even less support for the decision below, and indeed illustrate that the decision unduly expands the retail establishment exemption. *Burhans* v. *Montgomery Ward & Co.* 110 F. Supp. 184 (S. D. N. Y.) and *Duncan* v. *Montgomery Ward & Co.* 42 F. Supp. 879 (S. D. Tex.) (see Br. in Opp., pp. 27–28) were both cases involving a warehouse serving and identified *exclusively* with a *single* retail store. This is the limited situation to which respondent's quotation from the 1949 legislative history refers (see *supra,* pp. 16–17). Whether or not, prior to 1949, this limited extension of the exemption was inconsistent with the physical-separateness concept of the *Phillips* decision, Congress in 1949 apparently regarded the warehouse and store as separate establishments and

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representative of the general problem presented by the new Section 13 (a) (4). Also, it may be that review and reversal of the decision below in the instant case may suffice to resolve the problem which is now developing under Section 13 (a) (4).

felt it necessary, in order to preserve the exemption for employees in this limited situation, to do so on the basis that, although working *in* a separate establishment, they were "employed *by*" the single retail establishment for which their services were exclusively performed. These cases do not involve a substantial, if any, departure from the physical-separateness concept of *Phillips* or from the limited purpose of the exemption. In the other case cited by respondent (*Bogash* v. *Baltimore Cigarette Service,* 193 F. 2d 291 (C. A. 4)), the employees held exempt were engaged exclusively in servicing local retail vending machines.

Unlike these cases, respondent's enterprise is a *chain* organization engaged in both retail and non-retail functions.[7] This suffices to require application of the physically-separate unit concept for the same reason that this concept was applied in *Phillips*—in order to restrict the exemption to the local retailing businesses which were the sole concern of Congress. It is because the decision below departs completely from this basic purpose that it threatens to confuse

[7] Unlike the units in the *Burhans* and *Duncan* cases, the functions of respondent's Alameda warehouse (as respondent itself emphasizes, Br. in Opp., pp. 27, 28) are not keyed to or identified exclusively, if at all, with the functions of any other single retail unit, and unlike the *Bogash* case, the functions of Alameda are not identified exclusively with, or merely incidental to, respondent's local retail sales or services. Alameda is rather a functionally, as well as physically, independent unit of the five-unit chain comprising respondent's "division." The "division," although not co-extensive with respondent's entire enterprise, is nonetheless a quite extensive multi-unit, multi-function chain organization engaged in both retail and non-retail functions.

and unsettle the application of the Act in so wide and important an area.

CONCLUSION

For these reasons, and for those set forth in the petition, we respectfully submit that the petition should be granted.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Question presented	2
Statement	2
Summary of argument	7
Argument:	
Each of respondent's physically-distinct storage warehouses is a separate "establishment" and respondent's "Division" (composed of five large physically-separate warehouses) does not constitute a single "retail establishment" within the meaning of the exemption provided by Section 13(a)(2) of the Fair Labor Standards Act	11
A. The decision below is contrary to *Phillips Co.* v. *Walling*, 324 U.S. 490, and to the limited purpose of the Section 13(a)(2) exemption...	11
B. The limited purpose of the Section 13(a)(2) exemption and the meaning of the term "establishment," as construed in the *Phillips* decision and by administrative interpretation, were expressly reaffirmed by Congress at the time of the enactment of the 1949 Amendments to the Fair Labor Standards Act	17
C. Prior to the decision below, other Courts of Appeals consistently recognized the *Phillips* decision as controlling the meaning of the word "establishment" in Section 13(a)(2)	22
D. The decisions on which respondent has relied are inapposite and serve to confirm the error of the ruling below	24
Conclusion	32
Appendix A	33
Appendix B	35

CITATIONS

Cases:

	Page
Addison v. *Holly Hill Co.*, 322 U.S. 607	28
Allesandro v. *C. F. Smith Co.*, 136 F.2d 75	22
Alstate Construction Co. v. *Durkin*, 345 U.S. 13	10, 21
Armstrong Co. v. *Walling*, 161 F.2d 515	10, 22, 23
Bogash v. *Baltimore Cigarette Service*, 193 F.2d 291	31
Burhans v. *Montgomery Ward & Co.*, 110 F.Supp. 184	29, 31
Chrysler Corp. v. *Smith*, 297 Mich. 438, 298 N.W. 87	26
Duncan v. *Montgomery Ward & Co.*, 42 F.Supp. 879	29, 31
Farmers Reservoir and Irrigation Co. v. *McComb*, 337 U.S. 755	29
Fletcher v. *Grinnell Bros.*, 150 F.2d 337	10, 22
McComb v. *W. E. Wright Co.*, 168 F.2d 40, certiorari denied, 335 U.S. 854	10, 22, 23
McComb v. *Wyandotte Furniture Co.*, 169 F.2d 766	10, 22
Maneja v. *Waialua Agricultural Co.*, 216 F.2d 466, reversed 349 U.S. 254	10, 21
Mitchell v. *E. G. Shinner & Co.*, 221 F.2d 260	10, 22, 23
Mitchell v. *T. F. Taylor Fertilizer Works*, 233 F.2d 284	24, 26
Mitchell v. *C. W. Vollmer & Co., Inc.*, 349 U.S. 427	28
Montgomery Ward & Co. v. *Antis*, 158 F.2d 948, certiorari denied, 331 U.S. 811	10, 22
Overstreet v. *North Shore Corp.*, 318 U.S. 125	28
Phillips, Inc. v. *Walling*, 324 U.S. 490	7-9, 10, 11, 12, 13, 14-16, 17, 18, 19, 21, 22, 23, 24, 28, 30, 31
Powell v. *United States Cartridge Co.*, 339 U.S. 497	28
Roland Co. v. *Walling*, 326 U.S. 657	28
Spielmann v. *Industrial Comm.*, 236 Wisc. 240, 295 N.W. 1	27
Steiner v. *Mitchell*, 350 U.S. 247	10, 21
Tobin v. *Aibel*, 112 F.Supp. 156, affirmed, 204 F.2d 376	29
Walling v. *American Stores Co.*, 133 F.2d 840	10, 22, 24
Walling v. *Block*, 139 F.2d 268, certiorari denied, 321 U.S. 788	22
Walling v. *Goldblatt Bros.*, 152 F.2d 475, certiorari denied, 328 U.S. 854	10, 22, 23
Walling v. *L. Wiemann Co.*, 138 F.2d 602, certiorari denied, 321 U.S. 785	22
Fred Wolferman, Inc. v. *Gustafson*, 169 F.2d 759	10, 22, 24

Statutes:

	Page
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 as amended, c. 736, 63 Stat. 910, 29 U.S.C. 201 *et seq.*:	
Section 3(j)	29
Section 7	33
Section 13(a)(1)	12
Section 13(a)(2)	2, 4, 5, 7, 8, 9, 11, 12, 13, 17, 19, 22, 25, 28, 30, 33
Section 13(a)(a)(3)	33
Section 13(a)(4)	25, 26, 33
Section 16(c)	10, 21, 34
Section 17	2

Miscellaneous:

29 C.F.R. 617.5	29
29 C.F.R., 1955 Supp. 779.3(b)	35
29 C.F.R., 1956 Supp. 541.1(e)	15
15 F.R. 7245	35
95 Cong. Rec. 11004	9, 18
95 Cong. Rec. 11200	25
95 Cong. Rec. 11216	25, 26
95 Cong. Rec. 12498	25
95 Cong. Rec. 12502	9, 18
95 Cong. Rec. 12505	21
95 Cong. Rec. 12510	25
95 Cong. Rec. 12533	25
95 Cong. Rec. 12579	10, 19, 25
95 Cong. Rec. 14877	10, 18
95 Cong. Rec. 14928	26
95 Cong. Rec. 14932	19, 20, 26
95 Cong. Rec. 14942	25, 26
Frederick, *Public Warehousing*, pp. 15-16	13
Interpretative Bulletin No. 6, December 7, 1938 (1940 Wage-Hour Manual, p. 154)	35

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 122

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BEKINS VAN AND STORAGE COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The findings of fact and conclusions of law (R. 34-49) and the oral opinion of the District Court (R. 139-147) are not officially reported. The opinion of the Court of Appeals is reported at 231 F. 2d 25.

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1956. The petition for a writ of certiorari was filed May 29, 1956, and was granted October 8, 1956. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in full in Appendix A, *infra*, pp. 33-34. The provision particularly involved here is Section 13(a)(2) which reads as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

QUESTION PRESENTED

Whether five large physically-separate storage warehouses, including a central office which serves all five warehouses, constitute a single "retail establishment" within the meaning of the exemption provided by Section 13(a)(2) of the Fair Labor Standards Act.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime and record keeping provisions of the Act with respect to employees employed in its Alameda warehouse in the city of Los Angeles, California (R. 3-5). The warehouse in question is one of a large chain of storage ware-

houses operated by respondent, which engages in an extensive moving and storage business, with offices or agents in all principal cities (R. 35, 119). Respondent is the largest storage company in the United States, and its business includes the moving and storage of household goods, the moving of complete offices, stores and commercial and industrial operations, the storage of commercial goods, and the renting and leasing of office and building space (Fdg. 4, R. 35). In California, it owns and operates 36 warehouses, at each of which employees are regularly engaged in handling, packing, and storing goods substantial quantities of which have been, and are being, received from out-of-State points and have been, and are being handled, packed, shipped, delivered, transported, and offered for transportation to out-of-State points (Fdg. 5, R. 35). These warehouses, located in various parts of the State, are grouped into 19 divisions or districts (R. 11, 36), each with a main office patterned after respondent's general office (R. 36, 61-62). The offices for the various divisions perform all management, executive, and administrative functions for the warehouses within their jurisdiction (R. 42-43) and are responsible to respondent's general office or top management for the successful operation of such warehouses (R. 69).

1. Prior to 1938, all of respondent's warehouses in the metropolitan area of Los Angeles were operated as one organizational unit (R. 66). Since that date, respondent has set up two "divisions" in Los Angeles, designated as the "East Los Angeles Division" and the "West Los Angeles Division" (*ibid.*). The Alameda warehouse and four other physically-separate warehouses, together with a division central office (located in one of the warehouses) now comprise what is known

as respondent's East Los Angeles Division (Fdg. 10, R. 37-38). These warehouses are geographically scattered over an area of about six miles, each warehouse being from 1¾ miles to 6 miles distant from the others (Gov't. Exh. 2).[1] There is no dispute as to the substantial interstate character of the activities at all of the warehouses, nor is there any dispute that the Alameda warehouse, standing alone, engages substantially in non-retail storage in sufficient volume to disqualify it for the "retail establishment" exemption of Section 13 (a) (2) of the Act, if it is regarded as a single establishment. The parties stipulated and the District Court found that Alameda, standing alone, if it is a single "establishment" within the meaning of Section 13 (a) (2), does not meet the percentage tests prescribed in that section, *i. e.*, admittedly 50 percent or more of its annual dollar volume of sales of service is made outside the State and admittedly more than 25 percent is non-retail in character. It was also stipulated, on the other hand, that, if the "East Los Angeles Division", rather than each separate warehouse, constituted the "establishment," the Division does meet the percentage tests of the exemption (Fdg. 2, R. 34; Stip. R. 18).[2]

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[1] The original exhibits consisting of a map of the City of Los Angeles showing the location of each of these warehouses (Govt's. Exh. 2) and a group of photographs of the warehouses in the East Los Angeles Division (Govt's. Exh. 1) were transmitted to this Court by the Clerk of the Ninth Circuit.

[2] The pertinent provision of the stipulation reads as follows:

> "It is agreed and the Court may accept as established fact without further proof that the percentage tests of Section 13(a)(2) of the Fair Labor Standards Act of 1938, as amended, are satisfied if the East Los Angeles Division is a single establishment within the meaning of Section 13(a)(2), the business activities of which are considered together as a unit, but that

2. Alameda is a large five-story, reinforced concrete building containing approximately 60,000 square feet of space (Fdg. 13, R. 39). It is located approximately 1¾ miles from the warehouse which houses the "Division" office (Fdg. 10, R. 38). Unlike some of respondent's other warehouses which are located in residential areas from which they draw most of their business, the Alameda warehouse is located in the heart of the industrial area of Los Angeles on a spur track of the Southern Pacific Railroad where freight cars are regularly received and dispatched (Fdg. 15-16, R. 41, 129, 124; Stip. R. 12). In addition to the moving van equipment and loading docks which all of the warehouses have, Alameda is equipped with a railroad siding and railway loading docks to accommodate the loading and unloading of freight cars (Fdg. 13, R. 39; Fdg. 18, R. 43).

Although, when originally constructed over a half century ago (1898), the Alameda warehouse was in a residential section (R. 40, 126), the surrounding area now "consists entirely of a heavy industrial and commercial neighborhood" (Fdg. 16, R. 41). Because of the change in Alameda's environment, respondent has changed the character of the business done there to accommodate the customers in its immediate proximity (Fdg. 16, R. 42), with the result that this warehouse admittedly is no longer used essentially for storage of household goods as it once was. While the record does not disclose in detail the precise nature of Alameda's non-retail functions (the stipulation of their

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such tests are not met in the case of Alameda if Alameda alone is a single establishment within the meaning of Section 13 (a)(2), the business activities of which are considered separately as a unit." (Stip. XII, R. 18)

non-retail character made such evidence unnecessary), it appears that Alameda engages substantially in the general "storage of commercial goods" such as "phonographs and radios and washing machines, and things like that" for the business concerns located in its environs which "consist entirely of heavy industrial and commercial" enterprises (Stip. R. 18; Fdg. 16, R. 41, 129).

3. Alameda, like each of respondent's other warehouses, has its own foreman in charge of its physical operations, and its own separate crew of regular employees, although there is some interchange of employees among the several warehouses in the "Division" (Fdg. 13, R. 40; Stip. R. 13-14). The administrative management of Alameda, however, is organizationally integrated with the management of the other warehouses of the "Division." The executive, administrative, and clerical functions for the whole "Division" are performed by a central office located in one of the warehouses known as "Figueroa." The "Division" office is composed of a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager, and a storage manager who perform their respective duties for the whole "Division" (Fdg. 17, R. 42-43). In addition, the "Division" office employees keep the payrolls, handle all the accounting, do the banking, carry on an active sales program, and purchase the maintenance and operational materials and supplies (Fdgs. 19, 22-25, R. 43, 44-46).

4. The District Court held that respondent's whole East Los Angeles Division—consisting of Alameda, four other warehouses, and a central office—constitutes a single "establishment" within the meaning of the

exemption contained in Section 13 (a) (2) of the Act, and dismissed the complaint (R. 49, 50). The Court of Appeals affirmed, holding that "the proprietor's unit of operation and control may be considered * * * in determining what is an establishment." In arriving at this conclusion, the court held that this Court's decision in *Phillips, Inc.* v. *Walling,* 324 U. S. 490, did not hold that "if a business is in separate buildings, each building is necessarily an establishment," but that the rationale of *Phillips* was limited to the specific type of non-retail function there involved, *i. e.* "the warehouse function [which] historically had been that of independent wholesalers or wholesalers independent of retail grocers".

SUMMARY OF ARGUMENT

A. That the term "establishment," as used in Section 13(a)(2) of the Fair Labor Standards Act (App. A, *infra,* p. 33), means "a distinct physical place of business" and not a group of functionally integrated units of a chain organization, was settled over ten years ago by this Court's decision in *Phillips v. Walling,* 324 U.S. 490, 496. The decision below mistakenly treated this ruling as mere *obiter dictum,* overlooking the basic stress of *Phillips* upon the separate physical establishment as "the essential key" to a realistic restriction of the "retail establishment" exemption to its plainly limited purpose. The fundamental ground for the *Phillips* decision was the recognition that the only purpose of Section 13(a)(2) was to exclude from the scope of the Act "local retailing activities" and "local retailers who are situated near state lines and who make occasional interstate sales"—"the small local retailers who were the sole concern of Congress in Section

13(a)(2)" (324 U.S. at 497, 498), and that the "physically distinct" unit standard was "the essential key to the problem" of applying the exemption to large multi-function interstate chain enterprises without doing violence to this limited purpose (*Id.* at 495-496).

The attempt by the court below to distinguish *Phillips* on the ground that that decision applied only to the specific type of "wholesaler" function there involved, not only misconceives the basic rationale of *Phillips,* but is also factually untenable. The facts of the instant case, no less than those in *Phillips,* present the problem of applying the exemption to a large "multi-function," "hybrid" chain organization engaged extensively in non-retail functions "in the very midst of the stream of interstate commerce," as well as in local retailing functions (*id.* at 494, 495, 496). Not only are the admittedly non-retail functions of respondent's Alameda warehouse of the same "wholesaler" nature as the functions of the *Phillips* warehouse, but respondent's physically separate warehouses are functionally no more integral a part of the "Divisions" than the *Phillips* central office and warehouse was an integral part of that company's retail outlets. The *Phillips* central office and warehouse was held to be a separate establishment despite the express recognition that its functions were "completely meshed" and "integrated" with those of the sales outlets (*id.* at 494-495). Respondent's emphasis on the "Division" as "the smallest functional unit of the company" serves only to emphasize that the "functional unit" is not the type of "establishment" contemplated by the exemption. Obviously, the extensive multi-unit, multi-function "Division" here in issue does not even approxi-

mate "the small local retail establishments" "who were the sole concern of Congress in Section 13(a)(2)." (*Id.* at 498). The *Phillips* decision plainly rejected the notion that the reach of the "retail establishment" exemption, with its specific and limited objective, could depend upon the functional integration which a chain enterprise chooses to adopt for managerial convenience or for reasons of self-interest wholly irrelevant to the purpose of the exemption.

B. The limited purpose of the Section 13(a)(2) exemption and the meaning of the term "establishment," as construed in the *Phillips* decision and by administrative interpretation, were expressly reaffirmed by Congress at the time of the enactment of the 1949 Amendments to the Fair Labor Standards Act. While the amendment to this exemption was intended to expand it to the limited extent of allowing a retail establishment more leeway in making non-retail sales without losing the exemption, the sponsors of the amendment, in both the Senate and the House, repeatedly emphasized that the amendment did not go beyond "confirming the exemption for the various local neighborhood businesses whom it was the *original purpose* of the existing law to exempt," and would exempt only "establishments which are *traditionally regarded as retail,*" giving the same illustrations as those employed in the legislative explanation of the original enactment (referred to in *Phillips*), *i.e.* "the grocery stores, the hardware stores, the clothing stores," etc. (95 Cong. Rec. 11004, 12502, emphasis added). And to obviate any doubt of its acceptance and approval of this Court's view of the limited purpose of the exemption, the *Phillips* decision was specifically confirmed and its

definition of the term "establishment" expressly approved (95 Cong. Rec. 14877 and 12579).

In addition to the legislative history expressly approving the *Phillips* decision, the administrative interpretation in accord with that decision was legislatively reaffirmed by Section 16(c) of the 1949 Amendments, which provided that administrative interpretations not inconsistent with the amendments "shall remain in effect." See *Steiner* v. *Mitchell*, 350 U.S. 247, 255; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16-17.

C. Prior to the decision below, other Courts of Appeals consistently recognized *Phillips* as controlling. They applied the physically-separate-unit standard to a variety of chain and multi-unit organizations comparable to respondent's, and have not considered it as limited to the same kind of "wholesaler" functions involved in *Phillips*. *Armstrong Co.* v. *Walling*, 161 F.2d 515 (C.A. 1); *McComb* v. *W. E. Wright Co.*, 168 F.2d 40 (C.A. 6), certiorari denied, 335 U.S. 854; *Fletcher* v. *Grinnell Bros.*, 150 F.2d 337 (C.A. 6); *Montgomery Ward & Co.* v. *Antis*, 158 F.2d 948 (C.A. 6), certiorari denied, 331 U.S. 811; *Walling* v. *Goldblatt Bros.*, 152 F.2d 475 (C.A. 7), certiorari denied, 328 U.S. 854; *Mitchell* v. *E. G. Shinner & Co.*, 221 F.2d 260 (C.A. 7) (decided April 4, 1955, *i.e.* subsequent to 1949 Amendments); *McComb* v. *Wyandotte Furniture Co.*, 169 F.2d 766 (C.A. 8); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F.2d 759 (C.A. 8). See also *Walling* v. *American Stores Co.*, 133 F.2d 840 (C.A. 3), decided prior to *Phillips*.

D. The few decisions on which respondent has relied are inapposite and serve only to confirm the error of the

ruling below by plainly revealing its misconception of the purpose and context of the exemption here in issue.

ARGUMENT

Each of Respondent's Physically-Distinct Storage Warehouses Is a Separate "Establishment" and Respondent's "Division" (Composed of Five Large Physically-Separate Warehouses) Does Not Constitute a Single "Retail Establishment," Within the Meaning of the Exemption Provided by Section 13(a)(2) of the Fair Labor Standards Act

This Court's decision, over ten years ago, in *Phillips v. Walling,* 324 U.S. 490 (March 26, 1945), settled the meaning of the term "establishment" as used in Section 13(a)(2) of the Fair Labor Standards Act. It was there held that "establishment" means "a distinct physical place of business" and not "an entire business or enterprise" of a "multi-function" chain organization. 324 U.S. at 496. This decision was expressly approved by Congress at the time of the passage of the 1949 Amendments to the Act. The decision below patently rests upon a misconception of the *Phillips* decision and of the purpose of the Section 13(a)(2) exemption.

A. *The decision below is contrary to Phillips Co. v. Walling, 324 U.S. 490, and to the limited purpose of the Section 13(a)(2) exemption.*

1. The *Phillips* decision, which is the leading one on the "retail or service establishment" exemption, held that both the terms of Section 13(a)(2) and its purpose showed that "Congress used the word 'establishment' as it is normally used in business and in government—as meaning a distinct physical place of business," and that, therefore, each of the 49 stores of the Phillips chain, as well as the separate warehouse, was a

separate establishment (324 U.S. at 496)—regardless of the degree of integration of their functions and control, and regardless of the fact that the "prime function" of the chain system as a whole was to sell at retail. Section 13(a)(2), said the Court, "is the offspring of a manifest desire to exclude from the scope of the Act 'business in the several States *that is of a purely local nature*' * * * Congress was interested in exempting those regularly engaged in *local retailing* activities and those employed by small *local retail establishments*, epitomized by the corner grocery, the drug store and the department store * * * Section 13(a)(2) is a part of the Act *only* because of the fear that Section 13(a)(1) in exempting employees regularly engaged in a 'local retailing capacity,' did not clearly exclude those employed by *local retailers who are situated near state lines and who make occasional interstate sales*" (*Phillips*, 324 U.S. at 497, emphasis added). It was "the *small local retailers*, who were the sole concern of Congress in Section 13(a)(2)" (*Id.* at 498, emphasis added).

Obviously, the extensive multi-unit, multi-function, "Divisions" into which respondent has organized its huge enterprise do not even approximate the description of "small local retailers" doing business of "a purely local nature" except for "occasional interstate sales" due to "location near State lines" (see 324 U.S. at 497-498). By no stretch of the imagination can the group of five large warehouses constituting the "Division" at issue in this case be so characterized. Respondent's emphasis on the "Division" as "the smallest functional unit of the Company" (Br. in Opp. p. 9) serves only to emphasize that the

"functional unit" is not the type of "establishment" contemplated by the exemption. For, like the warehouse and central office in the *Phillips* case, the "Division" is undeniably engaged regularly and extensively in functions "in the very midst of the stream of interstate commerce" requiring that it "constantly deal with both incoming and outgoing interstate shipments"—functions "completely unlike those pursued by employees of the small local retailers, who were the sole concern of Congress in Section 13(a)(2)" (324 U.S. at 497-498).

2. The attempt of the court below to limit *Phillips* to the specific type of non-retail function there involved —*i.e.*, a function historically performed by the "independent wholesaler or middleman"—not only misconceives the basic stress of that decision on the separate physical establishment but also fails to recognize that factually the non-retail functions performed by a commercial storage warehouse, such as respondent's Alameda unit, are in this same "wholesaler" category. Warehousing of commercial goods is known in the trade as warehousing of "general merchandise", as distinguished from "household goods and furniture." See Frederick, *Public Warehousing*, pp. 15-16. "General merchandise warehouses" are defined as those used "for *the storage of merchandise and commodities by manufacturers or other shippers until the goods are required by retailers, distributors, or industrial and household consumers.* * * * General merchandise warehouses are frequently referred to as distribution warehouses. *They really act as service links between the producer and consumer.*" *Ibid.* [Emphasis added.] Therefore, there is no factual basis for the court's assumption that the admittedly non-retail functions of respondent's

Alameda warehouse are substantially different from the "wholesaler" functions of the *Phillips* warehouse.[3]

The fact that the warehouse performs its non-retail functions for independent industrial and business concerns, rather than for its own retail outlets, clearly does not suffice to distinguish the *Phillips* case. On the contrary, independent warehouse functions would *a fortiori* be outside the scope of the exemption, as is evident from the emphasis in *Phillips* on the analogy of the independent warehousing and wholesaling function. Similarly, the fact that the non-retail functions are here combined for administrative and management purposes with the company's retail functions is no more reason for applying the exemption than there was for exempting the non-retail warehousing functions which were organizationally integrated, indeed "completely meshed," with *Phillips'* retail operations (324 U. S. at 494-495).

3. The court below was also led into error by its acceptance of respondent's representation of the Government's position as a purely technical and artificial application of a "physical location" rule, based "upon the single fact that the Alameda building is geographically separate" (see Br. in Opp., p. 14). This reflects a distortion of the facts of this case, as well as a distortion of the physical-separateness principle itself. As the *Phillips* decision makes plain, the physical-separateness principle evolved out of the very real problem of apply-

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[3] The record shows that the Alameda warehouse engages substantially in the general "storage of commercial goods" (including "phonographs and radios and washing machines, and things like that," R. 129) for business concerns located in the "heavy industrial and commercial neighborhood" in which the warehouse is located (Stip. R. 10-11; Fdg. 16, R. 41-42; see also Gov't Exh. 1, including pictures of Alameda with "commercial storage" prominently marked on the outside wall of the building).

ing an exemption, clearly intended for the limited purpose of exempting local retail activities, to large multifunction interstate enterprises which are engaged extensively in activities other than local retailing. The problem presented by such large "hybrid" organizations was how to make the exemption available to the legitimate local retailing business without doing violence to the limited purpose of the exemption. It was this realistic approach that led to the conclusion in *Phillips* that the "physically distinct" unit is "the essential key to the problem" (324 U. S. at 495-496).

It is a fact that the physically-separate units of such a chain organization are separate *functionally* to a marked degree, as well as geographically. Respondent's physically-separate warehouses are no less functionally separate than the units of the typical chain organization, and it is a gross exaggeration to say that the "only identity which the Alameda building has * * * is that it is geographically separate" from the other warehouses of the division (Br. in Opp. p. 6). Each warehouse is not only located in a separate building but has its own equipment specially adapted to the type of warehousing carried on at the particular unit. The type of warehousing carried on by each differs in accordance with its location, the adaptability of its space, and the nature of its customers. Each has its own regular crew of employees and its own separate supervising foreman.[4] It is indeed the difference in the functions

[4] The fact that the foreman performs some manual work does not, contrary to respondent's apparent implication (Br. in Opp. p. 6), detract from his status as a supervisor or executive. The stipulated facts and the findings of the trial court make it clear that he manages the warehousing functions of his unit (Stip. R. 13-14; Fdg. 13, R. 39-40). Respondent's attempt to minimize his supervisory control is hardly consistent with the stipulated fact that he is exempt from the Act as an "executive." See 29 CFR, 1956 Supp. 541.1 (e).

of the various units, which derives in large measure from their physical location, which affords a realistic basis for applying the exemption without doing violence to its limited purpose.

Neither the fact that the physically-separate unit may fail to have the degree of functional separation necessary to operate as a completely separate business, nor the fact that it may be closely integrated with other units for purposes of more efficient and economical record-keeping and general management of the enterprise, can be determinative of its status as a separate "establishment." The Alameda warehouse is functionally no more integral a part of the "Division" than the *Phillips* central office and warehouse was an integral part of that company's retail outlets. The *Phillips* company, like the respondent here, relied heavily on its functional and organizational integration, and argued, in almost the precise words used by respondent, that "whether or not an establishment, great or small, is a 'retail establishment' depends, *not on the physical location of its units, but on the character of its business*" and that its sales outlets, warehouses and office constituted an integrated operation *"as if all these activities were confined in one building"* (*Phillips* Supreme Court Br. pp. 11-12, emphasis added; compare respondent's Br. in Opp. pp. 13-14). Although this Court expressly recognized that the functions of the office and warehouse were "completely meshed" and "integrated" with those of the sales outlets (324 U. S. at 494-495), it deliberately rejected Phillips' argument and adopted the physical-separateness test.

In practical effect, the decision below would leave an enterprise free to determine for itself, by its own administrative practices and organization, what constitutes

the "establishment," with the percentage tests then to be applied to whatever segment (regardless of size, number of units, and variety of functions performed) the company wishes to label as the "establishment." That this would allow the enterprise virtually complete freedom so to distribute its extensive non-retailing functions as to secure the exemption for the entire (or a large part of the) enterprise, contrary to the plain purpose of the exemption, is evident from the facts of the instant case. As the record here shows, self-interest alone, which rests largely on factors wholly irrelevant to the purpose of the exemption, determines what "the smallest business or operating unit" of an enterprise is. Prior to 1938, for example, all of respondent's warehouses in the entire metropolitan area of Los Angeles were operated as a single organizational unit (R. 66). The reach of the retail establishment exemption, with its specific and limited objective, cannot depend upon such managerial choices.

B. *The limited purpose of the Section 13(a)(2) exemption and the meaning of the term "establishment," as construed in the Phillips decision and by administrative interpretation, were expressly reaffirmed by Congress at the time of the enactment of the 1949 Amendments to the Fair Labor Standards Act.*

Respondent, in seeking to defend the decision below, has contended that the basic purpose of the original exemption has been entirely changed, since the *Phillips* decision, by the enactment of the 1949 Amendments (Br. in Opp., pp. 20-22). This contention is specifically and flatly contradicted by the legislative history of those Amendments. While the 1949 amendment to this exemption was intended to expand it to the limited

extent of allowing a retail establishment more leeway in making non-retail sales without losing the exemption, the sponsors of the amendment emphatically disavowed any intent to change or expand *the basic purpose or type of establishment*—as described in *Phillips* —for which the exemption was originally designed. Representative Lucas, who sponsored the amendment in the House, declared that it would do no more than confirm "the exemption for the various local neighborhood businesses whom it was the original purpose of the existing law to exempt" (95 Cong. Rec. 11004). Similarly, Senator Holland, who sponsored the amendment in the Senate, explained that it would have "the effect of confirming the exemption for the various local neighborhood businesses which it was the original purpose of the existing law to exempt" (95 Cong. Rec. 12502). It was likewise expressly stated in the report of the majority of the Senate Conferees that "the conference agreement exempts establishments which are *traditionally* regarded as retail" (95 Cong. Rec. 14877, emphasis added). The illustrations repeatedly used in the discussion of the amendments were the same as those employed in the legislative explanation of the original enactment (referred to in *Phillips*), *i. e.*, "the grocery stores, the hardware stores, the clothing stores", etc. (95 Cong. Rec. 11004, 12502).

To obviate any doubt of Congress' acceptance and approval of this Court's view of the purpose of the exemption, the *Phillips* decision was specifically confirmed; and this specific approval expressly and particularly adopted the *Phillips* definition of the term "establishment." See the Statement of the majority of the Senate conferees that the *Phillips* definition of "establishment" as "a physically separate place of business" was to be retained (95 Cong. Rec. 14877):

> * * * Under the present law (*Phillips* v. *Walling* (324 U. S. 490)) *a retail establishment means a physically separate place of business which possesses the characteristics of a retailer and does not mean an entire business enterprise. The conference agreement in no way changes the meaning of the term "establishment."* [Emphasis added.] [5]

Respondent, in its Brief in Opposition (p. 21), quotes the following excerpt from the Statement of the House Managers:

> Since, however, the exemption does apply to any employee employed "by" an exempt retail or service establishment, it is applicable to employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, whether or not the warehouse operation is conducted in the same building as the selling or servicing activities. [H.R. Rep. No. 1453, 95 Cong. Rec. 14932.]

But this excerpt, when read in the context of the immediately preceding sentences, patently contradicts the broad inference which respondent draws. The immediately preceding sentences read as follows:

> Paragraph (2) of section 13 (a) of the conference agreement does not exempt large mail-order

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[5] Senator George, one of the sponsors of the amendment to Section 13 (a) (2), made the same point (95 Cong. Rec. 12579):

> "* * * I wish to say that the word 'establishment' has been very well defined in the Wage and Hour Act. It means now a single physically separate place of business which possesses the characteristics of a retailer and it does not mean an entire business enterprise."

See also Senator Holland's statement, quoted *infra*, p. 21.

houses which make most of their sales to out-of-State customers. *Nor does it exempt warehouses and central offices of chain-store systems.* The employees in such warehouses and central offices are *not employed "by" any single retail or service establishment* in the chain *but rather by the chain itself*. [95 Cong. Rec. 14932, emphasis added.]

The sentence quoted by respondent, as is evident from its opening words, is simply contrasting the limited situation of a warehouse operated by and servicing "*exclusively*" a "single" exempt retail or service establishment (emphasis added). In a subsequent paragraph on the same page of the House Managers Report, the restricted intent of the word "by" is further explained —*i. e.*, to make clear that employees employed and working exclusively for a single exempt retail establishment are within the exemption "even though they may do most of their work outside the establishment," such as "bill collectors, outside repair and service men, outside salesmen, merchandise buyers, consumer survey and promotion workers and delivery men" (*ibid.*).

The remaining quotations from Senator Holland, on which respondent relies, are unrelated to the question of what constitutes the retail "establishment." Senator Holland was addressing himself to an explanation of the phrase "recognized as retail sales or services" for the purpose of determining whether the retail establishment meets the requirement that 75 percent of its sales of goods or services "is not for resale and is recognized as retail sales or services in the particular industry." That respondent's quotations from Senator Holland do not carry the implication of expanding the meaning of the term "establishment" is plain from the Senator's answer to the explicit question: "What effect

would this amendment have upon chain stores?" Senator Holland's answer was as follows:

> It leaves them in *exactly the same position as they are today.* Their warehouses and central offices would continue to be subject to the act. The individual branch stores, however, would continue to be exempt [he was obviously assuming, of course, that the stores met the specific retail and intrastate sales percentage requirements of the amended exemption]. This was the holding of the United States Supreme Court in *Phillips* v. *Walling* (324 U. S. 490), and *there is no intent in the proposed amendment to change such holding.* [95 Cong. Rec. 12505; emphasis added.]

Moreover, the consistent administrative interpretation of the term "establishment" as meaning "each physically separated unit" of a chain or multi-unit organization (see App. B, *infra*, pp. 35-36) was outstanding when the 1949 Amendments were enacted. Thus, in addition to the above-quoted express approval of the *Phillips* decision adopting this administrative interpretation, this construction was legislatively reaffirmed by Section 16(c) of the 1949 Amendments (c. 736, 63 Stat. 910, 916(c)) which provided that all administrative interpretations in effect at the time and not inconsistent with the amendments "shall remain in effect." See *Steiner* v. *Mitchell*, 350 U.S. 247, 255; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16-17. Thus, even if the *Phillips* decision were reasonably susceptible to the Ninth Circuit's construction, the decision below is contrary to the now-settled meaning of the term "establishment" as used in the exemption.

C. *Prior to the decision below, other Courts of Appeals consistently recognized the Phillips decision as controlling the meaning of the word "establishment" in Section 13(a)(2).*

The *Phillips* decision has been consistently applied by other Courts of Appeals to cases involving a variety of chain and multi-unit organizations comparable to respondent's. *Armstrong Co.* v. *Walling*, 161 F. 2d 515 (C.A. 1); *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40 (C.A. 6), certiorari denied, 335 U.S. 854; *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C.A. 6); *Montgomery Ward & Co.* v. *Antis*, 158 F. 2d 948 (C.A. 6), certiorari denied, 331 U. S. 811; *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475 (C.A. 7), certiorari denied, 328 U.S. 854; *Mitchell* v. *E. G. Shinner & Co.*, 221 F. 2d 260 (C.A. 7) (decided April 4, 1955, *i.e.*, subsequent to 1949 Amendments); *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C.A. 8); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F. 2d 759 (C.A. 8). See also *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C.A. 3), decided prior to *Phillips*.[6]

All of these decisions, involving various types of multi-unit organizations, were predicated on the basis that each distinct place of business is a separate "establishment." Insofar as the decision below includes central office employees within the exemption,[7] it is in direct

[6] Certiorari was granted in *Phillips* because of the conflict in reasoning between the First Circuit's *Phillips* decision and the Third Circuit's decision in *Walling* v. *American Stores Co.*, 133 F. 2d 840, on the one hand, and *Walling* v. *Block*, 139 F. 2d 268, certiorari denied, 321 U. S. 788; *Walling* v. *L. Wiemann Co.*, 138 F. 2d 602 (C. A. 7), and *Allesandro* v. *C. F. Smith Co.*, 136 F. 2d 75 (C. A. 6), on the other hand (see 324 U. S. at 493, n. 1).

[7] Respondent's central office is not located in the Alameda warehouse but is located in one of the other warehouses (Figueroa)

conflict, both factually and in legal principle, with the *Phillips, Wright, Goldblatt* and *Shinner* cases, *supra,* all of which held that physically-distinct central accounting, sales, and executive offices servicing several retail outlets were not exempt, regardless of the degree of functional integration with the operations of the retail outlets. In the *Wright* case, *supra,* the Sixth Circuit held the exemption inapplicable to the central offices, although they were located on the top story of the same building in which extensive retail functions were carried on. Similarly in *Goldblatt, supra,* the Seventh Circuit held the exemption inapplicable to the central offices although they were in the same building as one of the retail stores (152 R. 2d at 478). Thus, in this respect these cases are indistinguishable factually from the present one.

Also, contrary to the decision below, other Courts of Appeals have not considered the *Phillips* principle to be limited to the same kind of "wholesaler" functions as in that case. In *Armstrong, supra,* the inapplicability of the exemption was recognized with respect to a physically-separate warehouse servicing a chain of refreshment stands in various railroad stations, and the exemption was also held inapplicable to a commissary located in one of the railroad stations but preparing food for the various refreshment stands of the chain. There too, the company contended that *Phillips* was limited to the warehouse, claiming that the commissary "was part

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included in the same "Division" held by the court below to constitute an exempt "establishment." Because the company was complying with respect to these office employees at the time suit was instituted, no issue was raised as to their status. However, the decision below, holding the entire "Division" exempt, now obviously invites noncompliance with respect to the office employees also.

of one retail establishment" composed of the stands located in the same station as the commissary. In rejecting this argument, the First Circuit pointed out that the "commissary is integrated with, but physically distinct from, the stands in the station * * * . It is a distinct place of business * * * " (161 F. 2d at 516). Similarly, in *American Stores, supra,* the exemption was held inapplicable by the Third Circuit not only to the central office and warehouse, which performed wholesale functions like *Phillips*, but also to units engaged in various other non-retail (manufacturing and processing) operations. In the *Wolferman* case, *supra,* the Eighth Circuit held the exemption inapplicable to a kitchen located in one of the retail outlets but engaged in making candy and salad dressing for other retail outlets as well. Thus, these courts have recognized the *Phillips* rationale as applicable to any physically-separate non-retail unit of a multi-function business.

D. *The decisions on which respondent has relied are inapposite and serve to confirm the error of the ruling below.*

1. Respondent has cited *Mitchell* v. *T. F. Taylor Fertilizer Works,* 233 F. 2d 284 (C.A. 5) (decided subsequent to the decision below), as a case "which is the closest on its facts to the instant case that we have found" (Br. in Opp., p. 17). Apart from the quite different factual situation in *Taylor Fertilizer* (which involved a two-unit business composed simply of a processing plant and its sales office, in contrast to respondent's large chain organization), that decision serves to highlight the error of the decision below and "the possibilities of abuse" inherent in a loose construction of the term "establishment," which Congress ex-

pressly undertook to forestall in enacting the 1949 Amendments.

The Fifth Circuit there held that a fertilizer mixing plant located in the industrial part of Moultrie, Georgia, was simply an adjunct to a general sales office located five blocks away in the business district, and that the plant and sales office were "functionally an entity" and constituted a single exempt retail establishment under Section 13(a)(2) and the new Section 13(a)(4) added by the 1949 Amendments (see App. A, *infra*, p. 34), 233 F. 2d at 286.[8] This decision, like the decision below, rejected the "distinct physical place of business" concept in favor of the "functional" integration standard, with the result that the separate fertilizer processing plant, which, if not an ordinary factory was certainly a substantial processing enterprise uncharacteristic of a typical retail establishment, was held exempt as an adjunct to a retail sales office. This is not only contrary to the terms of Section 13(a)(4) which limits the processing aspects of the exemption to "processes at the retail establishment," but is directly opposed to the expressed legislative assurances that this section was not intended, and could not reasonably be construed, to exempt "manufacturing establishments, as such,"

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[8] The potentialities for the abuse of the new Section 13(a)(4) exemption (App. A, *infra*, p. 34) occasioned lengthy legislative discussions (see *e.g.*, 95 Cong. Rec. 11200, 11216, 12498-12506, 12510-12519, 12533-12534, 12579, 14942). It was because of these potentialities that the sponsor of Section 13(a)(4) explicitly stated that the exemption was premised on the restrictive meaning of the term "establishment," as construed in the *Phillips* case, "so as to safeguard against any abuses * * *" and "not to embarrass the administrators of the Act by bringing in the large producers who might be extensive manufacturers, but only small retailers, who are strictly retailers * * *" (95 Cong. Rec. 12579).

"merely because such establishments have, or create, a retail outlet," and that "The section does not permit the tail to wag the dog" (95 Cong. Rec. 11216, 14942).[9]

In any event, there is a marked contrast between the multi-unit, multi-function "Divisions" of respondent's enterprise and Taylor's two-unit business consisting of a processing plant serving exclusively its *single local retail sales outlet*. It is equally plain that respondent's extensive non-retail functions, unlike Taylor's fertilizer processing, are not performed as an incident to respondent's local retail sales or services, but are of a distinctive character adapted to the needs of its *non-retail* customers, and unrelated to its retail services except for

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[9] That the *Taylor* decision is an unwarranted expansion of the exemption is clear from the Statement of the House Managers accompanying the Conference Report on H. R. 5856 (Rept. No. 1453, Oct. 17, 1949, 95 Cong. Rec. 14928-14935), listing among the conditions upon which the exemption depends: "Third, the goods which the exempt establishment makes or processes must be made or processed *at the establishment which sells the goods*" (emphasis added). That this was not intended to refer to a geographically-separate processing plant is evident from the specific examples cited in which the exemption might apply "despite the fact that there is a physical dividing line between the manufacturing portion of an establishment and the selling portion *such as a partition, wall*, etc. For example, a bakery will meet the test even though it bakes its bread and pastries *in a back room* and sells same in *a front room of its establishment*. This exemption will apply typically to bakery establishments which bake the breads and pastries which they sell, ice plants which manufacture the ice they sell, and ice cream parlors or candy kitchens which make their own ice cream or candy" (95 Cong. Rec. 14932, emphasis added).

While we believe the *Taylor* decision to be erroneous, no petition for certiorari was filed in that case because the peculiar nature of the fertilizer business and the special character of Taylor's operations are not thought to be sufficiently representative of the general problem presented by the new Section 13 (a) (4). Also, it may be that review and reversal of the decision below in the instant case may suffice to resolve the problem which is now developing under Section 13 (a) (4).

for the fact that they are combined in a "hybrid" enterprise.

2. Respondent's reliance upon decisions construing State unemployment compensation statutes (Br. in Opp., pp. 32-33) reveals the extent of the departure by the decision below from the purpose of the exemption here in issue. Both the statutory policy and the context of the term "establishment," as used in the State unemployment statutes, are so dissimiliar from the present problem that this Court, in *Phillips,* did not even feel it necessary to mention the decisions on which respondent here relies, although both the petitioner (A. H. Phillips, Inc.) and the American Retail Federation, *amicus curiae,* relied on *Chrysler Corp.* v. *Smith,* 297 Mich. 438, 298 N. W. 87, and *Spielmann* v. *Industrial Comm.,* 236 Wisc. 240, 295 N. W. 1.[10]

The term "establishment" in the unemployment compensation statutes is in the context of a disqualification of unemployment due to a labor dispute "at the establishment" (nine States) or "at the factory, establishment or other premises" (majority of the States) at which the claimants are employed. Even if it be assumed that a broad interpretation of the term "establishment" is warranted under the policy of those statutes to prevent the use of unemployment funds in support of strikes or labor disputes,[11] the reason underlying such a broad interpretation is palpably inapplicable, and indeed diametrically opposed, to the limited purpose of the retail establishment exemption in the Fair Labor Standards Act. In the one case, the

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[10] Compare brief for A. H. Phillips, Inc., pp. 7-8, and brief of American Retail Federation, p. 18.

[11] But see the strong dissenting opinion in the *Chrysler* case, 297 Mich. at 454-476.

statutory policy to disqualify unemployment due to labor disputes might well be frustrated by ignoring the practical fact that, normally, a labor dispute in one unit leads to unemployment in related units of a functionally-integrated enterprise. On the other hand, the functional integration of a large multi-function enterprise, which admittedly is engaged extensively in interstate and non-retail functions, is scarcely a sound reason for broad interpretation of an exemption designed only to exempt "small local retailers, who were the sole concern of Congress in Section 13(a)(2)" of the Fair Labor Standards Act (324 U. S. at 498).

As this Court has repeatedly cautioned, the coverage of this Act is to be liberally construed and its exemptions strictly interpreted,[12] regardless of decisions construing different statutes, even though the other statutes may be "similar." See *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 131; *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427. If decisions construing "similar" federal statutes are not applicable, it cannot be gainsaid that decisions construing completely dissimilar State statutes are clearly inapposite. Indeed, the Court has held, in a decision under this Act, that the same word may not mean the same thing each time it is used, even though in the same statute, but must be

[12] The Court has said that an exemption from the coverage of the Fair Labor Standards Act should be "narrowly construed" and limited to situations "plainly and unmistakably within its terms and spirit." See *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 517; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617. The principle of strict construction of the exemptions is essential if the Act is to have the "sufficiently broad coverage" that is "vital to its mission" and basic purpose "to eliminate substandard conditions * * * on a wide scale throughout the nation." *Roland Co.* v. *Walling*, 326 U.S. 657, 669-670; *Powell* v. *United States Cartridge Co.*, 339 U.S. at 510, 516-517.

construed in its particular context. See *Farmers Reservoir and Irrigation Co.* v. *McComb,* 337 U. S. 755, where the word "produced" in the agriculture *exemption* was held to have a different and more limited meaning than the definition of "produced" for *coverage* purposes in Section 3 (j).

3. Respondent's reliance on *Tobin* v. *Aibel,* 112 F. Supp. 156 (E. D. N. Y.), affirmed 204 F. 2d 376 (C. A. 2) (Br. in Opp., p. 23), which it has cited in support of its contention that "petitioner itself has conceded" that physical separation is not determinative of a separate establishment (Br. in Opp., p. 23), reflects the same disregard for context and purpose. The issue in *Tobin* v. *Aibel* related to the application of an administrative regulation designed to protect the Act's standards by prohibiting the use of home workers in the knitted outerwear industry. This regulation broadly defined the industry *for the purpose of including all operations* in it, regardless of the division of parts of the industry among particular employers. Thus, it covered not only "knitting" but the "further manufacturing, dyeing or other finishing" of articles of knitted outerwear which are "partially or completely manufactured in the same establishment as that where the knitting process is performed" (29 C. F. R. 617.5).

The defendants in that case (a man and his wife) were engaged in the production of hairnets which are made from a knitted fabric. They sought to avoid the regulation by dividing the work between two entities (a corporation and a partnership) and by designating a physically-separate location for the distribution and collection of the homework. The issue was whether the defendants should be allowed to evade the Administra-

tor's regulation by this simple device. The decision to disregard the physical separation of the distribution point was thus no more than a practical, realistic recognition that the establishment where the knitting and partial manufacturing were performed was the same establishment using the homeworkers, and that the separate distribution point was simply a device to evade the plain purpose of the regulation. That decision has no relevance whatsoever in determining the meaning of "establishment" as used in the wholly different context of the Section 13 (a) (2) exemption.

4. The other decisions upon which respondent has relied afford even less support for the decision below, and indeed illustrate that that holding represents an unprecedented and wholly unwarranted expansion of the "retail establishment" exemption. *Burhans* v. *Montgomery Ward & Co.*, 110 F. Supp. 184 (S. D. N. Y.) and *Duncan* v. *Montgomery Ward & Co.*, 42 F. Supp. 879 (S. D. Tex.) (see Br. in Opp., pp. 27-28) were both cases involving a warehouse serving and identified *exclusively* with a *single* retail store. This is the limited situation to which respondent's quotation from the 1949 legislative history refers (see *supra*, pp. 19-20). Whether or not, prior to 1949, this limited extension of the exemption was inconsistent with the physical-separateness concept of the *Phillips* decision, Congress in 1949 apparently regarded the warehouse and store as separate establishments and felt it necessary, in order to preserve the exemption for employees in this limited situation, to do so on the basis that, although working *in* a separate establishment, they were "employed *by*" the single retail establishment for which their services were exclusively performed. These cases do not involve a substantial (if any) departure

from the physical-separateness concept of *Phillips* or from the limited purpose of the exemption. In the other case cited by respondent (*Bogash* v. *Baltimore Cigarette Service*, 193 F. 2d 291 (C. A. 4)), the employees held exempt were engaged exclusively in servicing local vending machines.

Unlike these cases, respondent's enterprise is a *chain* organization engaged in both retail and non-retail functions.[13] This suffices to require application of the physically-separate unit concept for the same reason that this concept was applied in *Phillips*—in order to restrict the exemption to the local retailing businesses which were the sole concern of Congress.

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[13] Unlike the units in the *Burhans* and *Duncan* cases, the functions of respondent's Alameda warehouse (as respondent itself emphasizes, Br. in Opp., pp. 27, 28) are not keyed to or identified exclusively, if at all, with the functions of any other single retail unit, and, unlike the *Bogash* case, the functions of Alameda are not identified exclusively with, or merely incidental to, respondent's local retail sales or services. Alameda is rather a functionally, as well as physically, independent unit of the five-unit chain comprising respondent's "Division." The "Division," although not co-extensive with respondent's entire enterprise, is nonetheless a quite extensive multi-unit, multi-function chain organization engaged in both retail and non-retail functions.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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NOVEMBER, 1956.

APPENDIX A

The Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C. 201), provides in pertinent part:

SEC. 7. [63 Stat. 912-913]:

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 13 [63 Stat. 917]:

(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided,* That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or (4)

any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *

* * * * *

SEC. 16. [63 Stat. 920]:

* * * * *

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

APPENDIX B

EXTRACT FROM INTERPRETATIVE BULLETIN No. 6, DECEMBER 7, 1938 (1940 Wage-Hour Manual, p. 154 at 157):

> 18. The question has been raised as to the scope of the term "establishment" in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate "establishment" within the meaning of the exemption.

Though the bulletin has been revised and reissued on several occasions, the Administrator has consistently adhered to the original interpretation of the term "establishment." The latest interpretation (15 F. R. 7245, Pt. 779.3 (b) (October, 1950) 29 CFR 1955 Supp., Sec. 779.3 (b)) reads as follows:

> SECTION 779.3.—THE "ESTABLISHMENT" BASIS FOR EXEMPTION UNDER SECTION 13(a) (2), (3), and (4):
>
> * * * * *
>
> (b) ***"Establishment" defined and distinguished.***
>
> The term "establishment" as used in section 13 (a) (2), (3), and (4) means a distinct physical place of business. The term is not synonymous with the words "business" or "enterprise" as applied to multi-unit companies. Such business organizations operate a number of establishments, some of which may qualify for exemption and some of which may not. For example, a manufacturing company which operates several places of

business for the sale of its manufactured products operates a number of separate and different types of establishments within the meaning of the exemptions. Each physically separate place of business must be considered as a separate establishment. Thus, in the case of chain-store systems, branch stores, groups of independent stores organized to carry on business in a manner similar to chain-store systems, and retail outlets operated by manufacturing or distributing concerns, each physically separated unit or branch store will, in the ordinary case, be considered a separate establishment within the meaning of the exemptions.

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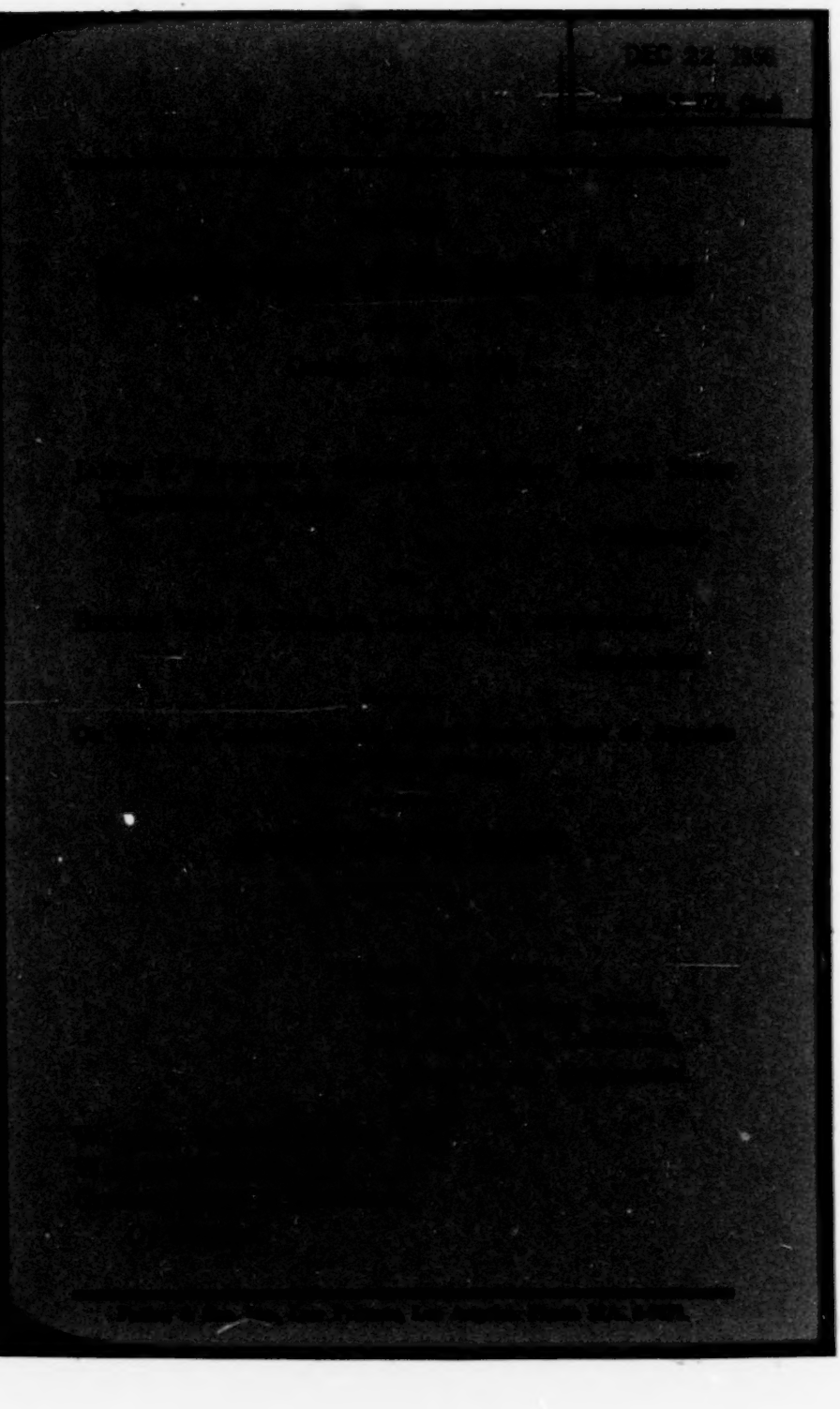

SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 2

Statute involved 2

Question presented 2

Statement of facts 3

Developments subsequent to decision below 8

Statement of legal issue 9

Summary of argument 10

Argument 12

Preliminary statement 12

I.

The separate physical location of a building comprising only a part of the smallest operating business unit with functional identity, does not constitute it a separate "establishment" under Section 13(a)(2). Customary business organization and practice are controlling considerations 18

A. The facts establish that Alameda has no identity except as a physical location; its integration with the division is complete 18

B. Section 13(a)(2) as amended 22

C. The legislative history of Section 13(a)(2) 23

D. Petitioner itself, in other cases, has taken the position first, that geographical considerations are not controlling, and second, that business usage and practice must be considered 26

PAGE

II.

Appellant relies principally upon the case of Phillips v. Walling (1945), 324 U. S. 490. To the extent that it is applicable, this case supports respondent's, not petitioner's, position 28

III.

Decisions since the Phillips case also confirm the correctness of respondent's position..... 35

The cases relied upon by petitioner do not support its position 39

IV.

The interpretation of the term "establishment" under the various unemployment compensation statutes support the decision below 42

V.

There is no justiciable controversy before the court, the case having become moot..... 46

Conclusion 51

Appendix. Agreement .....App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Armstrong Co. v. Walling, 161 F. 2d 515	41
Bogash v. Baltimore Cigarette Service, 193 F. 2d 291	36
Burhans v. Montgomery Ward & Co., 110 F. Supp. 184	37, 38, 39
Chrysler Corporation v. Smith, 297 Mich. 438, 298 N. W. 87	43
Duncan v. Montgomery Ward & Co., 42 F. Supp. 879	39
Fletcher v. Grinnell Bros., 150 F. 2d 337	41
Fred Wolferman, Inc. v. Gustafson, 169 F. 2d 759	41
General Motors Corporation v. Mulquin, 134 Conn. 118, 55 A. 2d 732	44
McComb v. W. E. Wright Co., 168 F. 2d 40, cert. den., 335 U. S. 854	41
McComb v. Wyandotte Furniture Co., 169 F. 2d 766	41
Mitchell v. E. G. Shinner and Company, 221 F. 2d 260	41
Mitchell v. T. F. Taylor Fertilizer Works, Inc., 233 F. 2d 284	35, 36, 41
Montgomery Ward & Co. v. Antis, 158 F. 2d 948, cert. den., 331 U. S. 811	37
Mountain States Tel. & Tel. Co. v. Sakrison, 71 Ariz. 219, 225 P. 2d 707	44
National Labor Relations Board v. Delaware-New Jersey Ferry Co., 90 F. 2d 520	50
Phillips v. Walling, 324 U. S. 490	11, 15, 16, 27, 28, 29, 30 31, 32, 34, 35, 36, 39, 40, 44
Snook v. International Harvester Co., 276 S. W. 2d 658	21, 44
Spielmann v. Industrial Commission, 236 Wis. 240, 295 N. W. 1	42, 43
Tobin v. Aibel, 112 F. Supp. 156, aff'd sub nom., Durkin v. Aibel, 204 F. 2d 376	26
United States v. Aluminum Co. of America, 148 F. 2d 416	47, 48
United States v. W. T. Grant Co., 345 U. S. 629	47

PAGE

Walling v. A. H. Phillips, 50 F. Supp. 749 32
Walling v. American Stores Co., 133 F. 2d 840 40
Walling v. Goldblatt Bros., 152 F. 2d 475, cert. den., 328 U. S. 854 40
Walling v. Shenandoah-Dives Mining Co., 134 F. 2d 395 49

CONGRESSIONAL RECORD

95 Congressional Record, pp. 11423 ff., 11217 ff., 12487 ff., 12718 ff. (1949) 15
95 Congressional Record, p. 12498 (1949) 15
95 Congressional Record, p. 12502 (1949) 24, 34
95 Congressional Record, p. 12510 (1949) 25
95 Congressional Record, p. 12516 (1949) 15
95 Congressional Record, pp. 14870-14872 23
95 Congressional Record, p. 14931 (1949) 14, 23, 24

FEDERAL REGULATIONS

29 Code of Federal Regulations (1955 Supp.), Sec. 779.3(b) .. 27
29 Code of Federal Regulations (1955 Supp.), Sec. 779.10 12

HOUSE REPORT

House Report No. 1453, 81st Cong., 1st Sess. (1949) 14, 24

STATUTES

Fair Labor Standards Act, Sec. 13(a)(2) 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15 21, 23, 24, 28, 30, 35, 36, 41, 45
52 Statutes at Large, p. 1067 (1938) 2
63 Statutes at Large, p. 917 (1949) 2
United States Code, Title 28, Sec. 1254(1) (1952) 2
United States Code, Title 29, Sec. 213(a)(2) 2

IN THE

Supreme Court of the United States

October Term, 1956
No. 122

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Petitioner,

vs.

BEKINS VAN & STORAGE COMPANY, a corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF.

Opinions Below.

The opinion of the District Court is not officially reported. The Findings of Fact and Conclusions of Law and the oral opinion of the District Court appear in the Transcript of Record, pages 33-49, 139-147. The decision of the Court of Appeals for the Ninth Circuit is reported at 231 F. 2d 25 and appears on pages 151-161 of the Record.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 1, 1956. The jurisdiction of this Court was invoked by the Petitioner under 28 U. S. C. Section 1254(1) (1952). The Petition for a Writ of Certiorari was granted October 8, 1956.

Statute Involved.

The statute involved is the Fair Labor Standards Act, as amended (52 Stat. 1067 (1938), as amended 63 Stat. 917 (1949), 29 U. S. C. Section 213(a)(2).) The particular provision is Section 13(a)(2) which provides an exemption from certain requirements of the Act for retail and service establishments. This section reads:

> "The provisions of sections 6 and 7 shall not apply with respect to . . . any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. . . ."

Question Presented.

Is the smallest management, operating and business unit of a moving and storage company a single *establishment* within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, as amended, even though parts of its activities are conducted in geographically separate buildings?

Statement of Facts.

Respondent is engaged principally in the business of moving and storing of household goods within the State of California. It is also engaged in the moving of used office equipment and furniture, the moving of stores and commercial operations, rug cleaning, fur storage, and rental of office and building space. Its principal place of business is located in Los Angeles, California [Fdgs. 4, 6; R. 35-36, 59-60]. Respondent's principal business is an exempt activity under Section 13(a)(2). The Secretary of Labor (hereinafter referred to as Petitioner) does not question this status except for one building [Fdg. 1; R. 34, 11].

Respondent's business consists of 19 divisions all located within the State of California. The division is the basic organizational unit of the Company. It is the smallest unit which has functional or operational identity. Each division contains one or more warehouse buildings where goods are packed, stored and handled. There is a total of 36 such buildings. Some divisions have only one building; others have more than one. There are twelve divisions in the Los Angeles area, as follows: Hollywood, Beverly Hills, Compton-Lynwood, Glendale, Wilmington, Inglewood, Long Beach, San Fernando Valley, Pasadena, Santa Ana, Santa Monica, and East Los Angeles [Fdgs. 5, 8; R. 35, 36].

Originally Respondent's operations in the Los Angeles metropolitan area were organized with a West Los Angeles Division and an East Los Angeles Division. The West Los Angeles Division included Hollywood, West Hollywood, Beverly Hills, and Santa Monica, and the East Los Angeles Division consisted of the present geographi-

cal area [described in Fdg. 10; R. 37-38]. Prior to 1946, following Respondent's policy of decentralization insofar as practicable, the West Los Angeles Division was divided into the Hollywood, Beverly Hills, and Santa Monica Divisions. In 1946 and again in 1950, the Company gave thorough consideration to dividing the East Los Angeles Division into smaller units but on each occasion decided that it was not practical nor feasible to do so [Fdgs. 8, 9; R. 36-37].

The business of Respondent was commenced in 1895 in Los Angeles. Since that time it has grown and expanded, principally with respect to the moving and storage of household goods. Because of expansion and growth, it has been necessary from time to time for it to acquire new warehouse space or warehouse additions. This space, for historical reasons resulting from the growth of Los Angeles, was provided in separate buildings. [Fdgs. 6, 7, 16; R. 35-36, 42, 92-95, 138.] The East Los Angeles Division consists of five buildings of which one is the Alameda building. The Division office is located in another building of the Division located on Figueroa Street in Los Angeles. The Alameda building is approximately 1¾ miles from the Figueroa building; the other three are from 1.8 to 3.5 miles from Figueroa [Fdg. 10; R. 38.]

Petitioner contends that just one of the buildings, comprising the East Los Angeles Division, the Alameda building, is a separate "establishment" and as such fails to meet the test of exemption as a retail or service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, as amended. Respondent contends that the Division, rather than just a physically separated building which is a part of the Divi-

sion is the "establishment" within the meaning of Section 13(a)(2). If the Division, not the building, is the establishment, Petitioner concedes that it meets the tests for exemption. If the building is the establishment, it does not meet such tests [R. 18].

The Company could carry on its operations within the East Los Angeles Division as well or better if all of its business were carried on in a single large building instead of in five buildings geographically separated [Fdg. 16; R. 41-42].

All of the management, executive and administrative functions of the Division are performed by individuals whose principal office and location is at the Division office and who give direct orders to and supervise the employees at all five buildings in the East Los Angeles Division. These individuals make daily visits to each of the buildings in the Division. They include a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager, and a storage manager. Each of these individuals performs his duties in his respective field for the entire East Los Angeles Division. Together they are responsible for the success of the operations of the Division as a whole. No one is responsible only for the success of the Alameda building or any one of the other buildings in the Division. The division manager in charge is responsible for *all* operations within the particular division. No management functions are performed separately for any one building. [Fdg. 17; R. 42-43].

Each of the buildings within the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of moving vans. The Division is responsible for providing moving and storage and other services through-

out its territory. The territory is not further subdivided or broken down. No part of the territory is allotted to any particular building. [Fdgs. 11, 18, 19; R. 38, 42-43].

The only significance which the Alameda building, or any of the other buildings, as such, has is that it is geographically separated from the office of the Division and from the other buildings utilized by the Division.

The Alameda building is an integral part of the Division as shown by the following additional facts:

(1) Substantially the same function of packing, storing and moving goods of various kinds, both commercial and household, is performed in each of the five buildings [Fdgs. 5, 11; R. 35, 38].

(2) The highest level of supervision at Alameda is that of working foreman, a position which involves manual work. All other supervision is provided by the Division [Fdgs. 12, 13, 17; R. 39-40, 42-43].

(3) All dispatching and orders are handled from the Division office [Fdg. 18; R. 43].

(4) Sales activities are conducted on a division basis, and sales territory is allocated without regard to location of individual buildings. Almost all contact with customers is handled by the Division [Fdgs. 19, 20; R. 43-44].

(5) The working force in the Division is interchangeable; employees are frequently and regularly shifted between buildings [Fdg. 21; R. 44].

(6) Records for operations in all buildings, including payroll records, are kept only at the Division office. A single system of accounts and records for operations at all buildings is maintained for the entire Division at the Division office with no separate accounts at or for the

individual buildings. No separate financial statements are made for each building; all are on a division basis. Only one bank account is maintained for the entire Division [Fdgs. 14, 22-24; R. 40, 44-45].

(7) All supplies used by the various buildings are purchased either on a company-wide or Division-wide basis [Fdg. 25; R. 45-46].

(8) Repair and maintenance of automobile equipment is handled only on a Division-wide basis [Fdg. 25; R. 46].

(9) All employees of the Division involved in this litigation are represented by a single local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of North America; one collective bargaining agreement applies uniformly to all [Fdg. 27; R. 46-47]. Seniority and other provisions have no applicability for the Alameda building alone but operate on area-wide basis [R. 20-33].

Of the employees working within the Division, there are 11 who work in the Alameda building. Of such 11 employees, one is a warehouse foreman who performs manual work but who is exempt under the Act as a supervisor, and two are office workers who receive overtime compensation equal to that required by the Act. The remaining employees are warehousemen. These employees and others in the Division are regularly transferred to and from the other buildings in the Division. Except for such employees and the corresponding employees in the other buildings, all employees, including management, supervision, sales, dispatch, office, et cetera, are located at the Division office [Fdgs. 12, 17; R. 39-40, 42-43].

It would not be practical, economic or good business practice for Respondent to divide its East Los Angeles

Division into smaller management, administrative or operating units because (a) the cost of doing so would be much greater than the present costs, (b) the present single administration, management and operation permit much greater flexibility which is required for the kind of business done by the East Los Angeles Division as a whole, and (c) the type of work being handled by Respondent requires the present method of management, administration and operation [Fdg. 26; R. 46, 131-132].

Developments Subsequent to Decision Below.

In connection with this statement of facts, Respondent desires to point out certain developments which have taken place subsequent to the decision of the Court below in this matter.

On April 1, 1956 the collective bargaining agreement between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of North America and the van and storage industry of Los Angeles and Orange Counties, to which Respondent was a party, expired. The expired contract did not provide for overtime compensation on Saturdays. Following negotiations between the industry and the union a new agreement was reached which is now effective and to which Respondent is a party. The negotiations on behalf of the industry were conducted by a committee of five members representing some 55 companies comprising the substantial majority (possibly 85 to 90%) of the moving and storage business of this area. All companies sign identical substantive agreements. Respondent has one representative on the negotiation committee. A copy of the new agreement is set forth in the Appendix.

Among other things this agreement provides for the payment of time and one-half the regular hourly rate for all work performed on Saturdays as well as on Sundays. The regular workweek is from Monday through Friday, inclusive. The collective bargaining agreements between the parties have in the past provided and the newly negotiated agreement continues to provide for time and one-half the straight-time hourly rate for work performed in excess of eight hours in any one day during the regular workweek. The contract is for a five-year period with wages, pension plan and security fund payments only subject to reopening on anniversary dates during the fourth and fifth years. The employees involved herein are covered by the agreement.

By contractual obligation therefore, upon an industry basis, with one of the strongest unions in the country, the requirements of the Fair Labor Standards Act concerning the payment of overtime, the principal basis of this litigation, have now been met. As a result the necessary payroll records will be kept.

Statement of Legal Issue.

The issue of law concerns the meaning of "establishment" as that term is used in Section 13(a)(2) of the Act, as amended. Petitioner contends that the Alameda building alone is an "establishment." Respondent contends that the East Los Angeles Division is the "establishment." Petitioner concedes that if the Division is the "establishment" within the organization of Respondent, it is exempt as a retail establishment within the meaning of Section 13(a)(2) [R. 18].

Summary of Argument.

Respondent contends that the unanimous decision of the Ninth Circuit affirming the decision of the District Court is correct and should be affirmed because:

(1) The Division, rather than merely a physically separate building which together with other buildings comprise that Division, is the "establishment." All of the functions which comprise a place of business or an operating business unit—management, executive, administrative, operating, financial, banking, record keeping, employee relations, sales, customer contact, dispatching purchasing orders, accounting, supplies, repair and maintenance and all supervision above the level of working foreman—are conducted upon a Division basis. These are the factors which constitute functional identity for any business unit. Only the physical work involved in handling and storing goods in the Alameda building and work directly incidental thereto, is performed in that building. The Division, not a building which is only a physical location for part of the work of the Division, is the smallest business and operating unit of the company with functional identity [Fdg. 8; R. 36].

(2) Petitioner's case is based only upon the separate geographical location of that building, contrary to the position that Petitioner itself has taken in other cases. Physical location alone is not a sufficient basis upon which to determine the existence of an establishment; otherwise every shed would be an establishment. While it may be an item, the controlling factors involve functional identity and customary business organization, operation and purpose. The purpose and application of Section 13(a)(2) requires the consideration of these factors, particularly in the light of its legislative history.

(3) No case that we have been able to find supports the position of Petitioner. To the extent that it is applicable, *Phillips v. Walling* (1945), 324 U. S. 490, upon which Petitioner almost entirely relies, supports the position of Respondent. The decision and the facts upon which it is based clearly demonstrate that customary business organization, functions and practice must be considered. That case does not support the proposition that separate physical location is a controlling factor; the issue was not even involved there. Decisions since the *Phillips* case confirm the correctness of Respondent's position.

(4) Petitioner argues at length that Section 13(a)(2) was designed to exempt only "small local retailers" and that it was not designed to exclude "large multi-function interstate enterprises" (Pet. Br. 12). Yet, except for one building, Petitioner does not question the exempt status under Section 13(a)(2) of the business or operations of Respondent or of the East Los Angeles Division if that is determined to be the establishment. Petitioner's argument is clearly irrelevant since it would apply to not just the Alameda building but to Respondent's entire business as well, which Petitioner except for Alameda does not question as exempt.

(5) The interpretation of the term "establishment" under the various unemployment compensation statutes supports the position of Respondent. Similar considerations are involved in the application of those statutes.

(6) No justicible controversy is presented to the Court, the case having become moot.

ARGUMENT.

Preliminary Statement.

Petitioner continuously refers to Respondent's business among other things as "a huge enterprise," as "the largest storage company in the United States," and as a "large multi-unit, multi-function interstate chain enterprise" (*e. g.* Pet. Br. 3, 12, 13).

Despite this argument by characterization, the simple fact is that Respondent is principally engaged in the storing and moving of household goods within the State of California, an activity which Petitioner himself concedes to be exempt as a retail and service establishment within the meaning of Section 13(a)(2). By the Administrator's own regulation, this activity is exempt.

> *"Section 779.10*
>
> "(a) *Types of establishments whose sales or services may be recognized as retail:*
>
> * * * * * * * *
>
> "Household furniture storage and moving establishments."
>
> 29 C. F. R., 1955 Supp., Sec. 779.10

Petitioner does not contend that any of Respondent's warehouses either in the East Los Angeles Division or elsewhere fail to meet the tests of exemption as a retail or service establishment within the meaning of Section 13 (a)(2) of the Act, except only the Alameda warehouse [Fdg. 1; R. 34, 11].

Thus the exempt status of Respondent in its major—almost entire—operation is not questioned. Eighteen of the 19 divisions and 4 out of the 5 buildings of the 19th Division may be considered to be exempt, based

on the position taken by the Petitioner. There is only one building out of Respondent's whole operation which Petitioner contends is not exempt.

The fact that a "huge" or "multi-unit, multi-function interstate enterprise" may be involved (quite aside from the meaning or accuracy of these terms) would of course be just as significant in determining the exempt status of Respondent's other divisions or buildings. These characterizations would be just as applicable whether the Alameda building or the East Los Angeles Division is the establishment. Yet Petitioner concedes that one or the other is the establishment [R. 18]. Whether true or not such characterizations have not affected the exempt status of Respondent's business, other than Alameda, in the viewpoint of Petitioner himself. They are obviously irrelevant. And they comprise much of Petitioner's brief.

Petitioner makes much of the fact that commercial goods are handled in the Alameda building. He does so by referring to the size of the building, its location and facilities, and by pointing out, for example, that Alameda has a railroad siding and railroad loading docks (Pet. Br. 5). Petitioner overlooks the fact that all of the warehouses except one regularly engage in handling commercial goods, that ten of the warehouses have railroad sidings, and that various of the warehouses handle, pack, and store substantial quantities of goods which are received from and shipped to out-of-state points [Fdg. 5, R. 35]. Yet Petitioner does not question the status of any of these warehouses as exempt under Section 13(a)(2).

Nor can the contention successfully be made that the Alameda building should be a separate establishment be-

cause more commercial goods may be handled there than in the other buildings.

Congress has eliminated the distinction formerly drawn by the Administrator between sales and service to commercial users and sales and service to non-commercial users. Sales and service to commercial users can be retail as well as those to non-commercial users.

The House Managers' Statement* explaining the bill which amended Section 13(a)(2) in 1949 states:

> "The amendment (Sec. 13(a)(2)), agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657); *McComb v. Diebert* ((E. D. Pa. 1949), 16 Labor Cases, Par. 64,982); *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio 1948))."
>
> H. R. Rep. No. 1453, 81st Cong., 1st Sess. (1949); 95 Cong. Rec. 14931 (1949).

Senator Holland, the sponsor of the amendment in the Senate which was later enacted into law, in criticizing the position of the Administrator concerning business or commercial sales, said concerning the Amendment:

> ". . . we propose to do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which regardless of the size, and regardless of the fact that it is intrastate,

---

*This was the only report concerning the amendment considered by Congress prior to its enactment.

> can never be held to be a retail sale under the regulations or under the interpretative rulings of the Administrator."
>
> 95 Cong. Rec. 12498 (1949).

The intent of Congress to eliminate this distinction is very clear from the lengthy debate on the subject as well as from the House Manager's Report.

> See: 95 Cong. Rec. 11423 ff., 11217 ff., 12487 ff., 12718 ff. (1949).

In this connection, it will also be noted that throughout its brief, Petitioner refers not to the "wholesale" function (which was involved in the *Phillips case* infra*), but rather refers to what it designates as the "non-retail function" (*e.g.* Pet. Br. 8). This distinction was criticized and rejected by Congress in connection with the amendment of Section 13(a)(2) in 1949. Senator Taft in debate supporting the adopted amendment stated:

> "Under this concept, the Administrator, with some support from the courts, made rulings in the case of those selling automobiles, under which, if I buy an automobile for my own use, for ordinary pleasure purposes, that is a retail sale, but if an automobile salesman sells a truck to a commercial establishment, that is not a retail sale. He does not dare say it is a wholesale sale, because we all know it is not a wholesale sale. He says it is a nonretail sale."
>
> 95 Cong. Rec. 12516 (1949).

Petitioner recognizes as well here that there is no "wholesale" function as in *Phillips*. He therefore refers to a "non-retail activity"—a rejected concept.

---

*(1945) 324 U. S. 490.

As will be shown below, the Alameda building is by no means comparable to a retail store as Petitioner argues (Pet. Br. 15). If such a comparison is proper the retail store is comparable to the Division. Indeed if a retail store consisted of five buildings, the comparison with the Division would be complete. Furthermore, Respondent could carry on all of its business within the Division as well as or better if the East Los Angeles Division consisted of a single large building instead of five geographically separated buildings [Fdg. 16; R. 41].

Petitioner devotes a substantial portion of his brief to re-arguing the *Phillips* case (*e.g.* Pet. Br. 11-17). We do not quarrel with the correctness of that decision. Petitioner ignores what we consider to be rather obvious factual distinctions between that case and this. His comparisons which are very general are also invalid. The issue decided there is quite different from that presented in this case, as argued below. That case to the extent that it is applicable, supports Respondent's, not Petitioner's position. Indeed, Petitioner is quite inconsistent in certain of his positions which he advocated in that case as compared with the position he has taken in this case.

Petitioner contends that if Respondent's position were accepted, Respondent could, by its own act, determine whether or not a given activity constituted a retail or service exemption (Pet. Br. 16-17). Presumably any business could do so merely by tailoring its activities to the exemption requirements of the Act. There would be nothing improper in doing so, if this were one of the main concerns in operating a business.

In this case, however, Petitioner's argument is meaningless for at least two additional reasons: (1) Respondent has operated its business in substantially the same manner for over half a century; (2) Respondent could as well by its own act determine whether a given activity constituted a retail or service establishment even if Petitioner's argument were accepted. Since all of the divisions handle commercial goods except one, Respondent could just as well defeat Petitioner's position merely by adjusting the proportion of commercial goods that were handled in the various buildings. The fact that it has not done so is a clear indication that it is operating its business for purposes other than to defeat the requirements of the Act.

The Court below stated in this respect:

> "Here the defendant's pattern of business with central control at one of the area warehouses existed before the adoption of the act. No one suggests that Bekins has adjusted its business to try to get around the act" [R. 152].

I.

The Separate Physical Location of a Building Comprising Only a Part of the Smallest Operating Business Unit With Functional Identity, Does Not Constitute It a Separate "Establishment" Under Section 13(a)(2). Customary Business Organization and Practice Are Controlling Considerations.

A. The Facts Establish That Alameda Has No Identity Except as a Physical Location; Its Integration With the Division Is Complete.

The Alameda building is clearly not a place of business or an operating business unit in any ordinary or usual sense. It has no functional identity in any business sense. The only function performed there is the physical one of moving and storing goods and directly incidental activities in connection therewith. This involves only those employees necessary to accomplish this work together with those who are required to directly supervise the work of such employees at the first level—the working foreman. *All other functions which comprise a place of business or an operating business unit—management, executive, administrative, operating, financial, banking, record keeping, employee relations, sales, customer contact, dispatching, purchasing, orders, accounting, supplies, repair and maintenance, and all supervision above the level of working foreman—are handled on a division basis.* The division is the smallest operating business unit of the company with functional identity [Fdgs. 13, 17-25; R. 39, 42-46].

The same functions of packing, storing, and moving of goods are performed in each of the five buildings. No territory is allotted to or served by each building; this is also done on a division basis. The working force is in-

terchangeable. Employees are regularly and frequently shifted among the buildings within the Division. All employees within the Division are covered by a single agreement with the Teamsters Union. This agreement has seniority and all other provisions applicable area-wide. There is, for example, no separate seniority status for the Alameda or any other building. The same is true with all other provisions of the agreement [Fdgs. 16, 19, 21, 27; R. 41-42, 43, 46-47].

The Alameda building is part of an integrated operation only physically removed from the management offices of the Division. The building could be a physical part of the Division office without any significant change being necessary in the organization or operation of the business [Fdg. 16; R. 41-42].

Indeed, it was specifically found by the trial court that Respondent could carry on its operations in the East Los Angeles Division as well or better if all of its business in the Division were carried on in a single large building instead of five buildings geographically separated [Fdg. 16; R. 41-42].

In this connection, the Court below stated:

> "To this court, an important factor here is that if it were not for financial or capital problems and the necessity of using what one has, it would be quite feasible to conduct, and Bekins probably would conduct, the business of the five warehouses in one central warehouse under one roof" [R. 153].

Several of the Company's divisions consist of only one building [Fdg. 5; R. 35]. Petitioner fails to show any valid reason why a division with more than one building should be treated differently from a division with only one building.

Petitioner's case must be based upon the fact that the Alameda building is separated geographically from the Division office. Petitioner must concede that all of the business functions other than the physical work of moving and storing goods and the supervision and office work directly incidental thereto, are conducted upon a division basis.

If Petitioner's contention were adopted where would the line be drawn? If because of lack of warehouse space in a large central warehouse, part of the warehouse space were obtained in an immediately adjacent building directly connected by passageways with the main warehouse, or if an additional floor were added, would either then become a separate establishment? What if the building were moved across the street connected by an overhead walkway? Would it make a difference if the walkway were then removed? Certainly Congress could never have intended that the removal of so tenuous a connection should be the criterion in determining whether or not a separate establishment existed. Would the result then be different if the building were moved a block or two away? It seems very clear that physical location alone cannot be the controlling factor.

Judge Carter at the trial stated:

> "What constitutes an establishment will depend upon the particular facts in each case. Certainly it cannot be determined by the application of a geographical yardstick. For example, whether a warehouse used by a retail establishment is in an adjacent building, across an alley, across a street, around the corner or a mile or two away, is certainly not the test for determining whether the warehouse and the retail store constitute one establishment" [R. 142].

* * * * * * * *

"If these five warehouses were located side by side down on Figueroa Street, I don't think plaintiff would seriously contend that they were separate establishments. Or suppose four of them were located there and one of them was located out where it has a spur track, I don't think there would be any contention that they are separate establishments" [R. 146].

This conclusion was unanimously affirmed by the Court below, the Court stating:

"The unit of operation of Bekins seems to be the 'division.' Doubtless, the secretary would not take the position he does here if the buildings were side by side, although separate. It does not seem unreasonable to consider the five warehouses, generally in downtown Los Angeles within a limited radius, as one establishment." [R. 152.]

In answering a contention that a foundry and machine shop constituted separate establishments for unemployment compensation purposes, because of differences in type of work, terms of employment, immediate supervision and union representation, the Supreme Court of Kentucky in *Snook v. International Harvester Co.* (Ky., 1955), 276 S. W. 2d 658, discussed below, said:

". . . To follow their argument to its logical conclusion, each *employee* would constitute a separate establishment because he is separately employed, works under different conditions, has a different seniority, etc." (Emphasis by the Court.)

Snook v. International Harvester Co., 276 S. W. 2d at 661.

We believe that ordinary and customary business practices are determinative in this case. There is much authority to support this result, but none to support the contrary result.

B. Section 13(a)(2) as Amended.

The language of Section 13(a)(2) (quoted on p. 2, *supra*) is most relevant as applied to the facts in this case. It will be noted that the section specifically refers to "annual dollar volume," to "sales of goods or services," to "not for resale" and to the "particular industry." Put together the reference is to the annual dollar volume of sales of goods or services made by the establishment within the state in which the establishment is located.

The clear purport of this section denies any reference to geographical location alone as being a criterion in determining the application of the exemption. The reference is to an operating business unit with functional identity. How else could the annual dollar volume of sales be determined? Not one of the references in the section would apply to the Alameda building. If it were determined to be an establishment, how could its annual dollar volume be determined? The Company would have to fundamentally alter its method of doing business carried on for half a century. Dollar value sales records and all other accounting and sales management methods are determined on the basis of the Division [Fdgs. 17-25; R. 42-46].

It is therefore clear that if geographical locations were a controlling factor, the tests which Congress adopted would have to have been otherwise stated. The fact that they were stated as they were shows that it is not the geographical location of a particular building which is to control, but rather the existence of a place of business or an operating functional unit thereof.

C. The Legislative History of Section 13(a)(2).

The legislative history preceding the 1949 amendments to the Act emphasizes the fact that Congress had in mind some reasonable relationship to ordinary business practices.* In this case the business practices of Respondent have been substantially the same since its founding in 1895. Under those practices a single warehouse has had no significance as a separate business unit. It has merely been a physical part of the basic unit of the business, the division [Fdgs. 6-9, R. 35-37]. To ignore these business practices would not only do violence to the clear intent of Congress but would base a distinction upon considerations that are not significant in a business operation.

The legislative history of the amendment to Section 13(a)(2) shows that physical location is not a controlling criterion in the application of that exemption. In the *House Manager's Statement*** explaining the bill which was later enacted without change, the following is stated:

> "The location of the establishment, whether in an industrial plant, an office building, a railroad depot,

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*Petitioner states that Respondent has contended that "the basic purpose of the original Section 13(a)(2) exemption has been entirely changed" by the 1949 amendments (Pet. Br. 17). Petitioner has not made such a contention. It was erroneous interpretations of the Administrator, among other things, which Congress specifically stated it was correcting. (See *e.g.* 95 Cong. Rec. 14931 (1949).)

**This was the only report concerning the amendment considered by Congress prior to its enactment.

Petitioner quotes from a document entitled "Statement of the Majority of Senate Conferees." (Pet. Br. 18-19.) This document is not a part of the legislative history of the 1949 amendments. It concededly represents the views of three senators only and was not before the Senate during the debates. It was inserted in the record *after* the amendments were passed by the Senate (95 Cong. Rec. 14870-2).

or a Government park, etc., will make no difference in the application of the exemption.

". . .

". . . Since, however, the exemption does apply to any employee employed 'by' an exempt retail or service establishment, it is applicable to employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, *whether or not the warehouse operation is conducted in the same building as the selling or servicing activities.*"

H. R. Rep. No. 1453, 81st Cong., 1st Sess. (1949); 95 Cong. Rec. 14932 (1949).*

Senator Holland, the sponsor in the Senate of the amendment to Section 13(a)(2) which was later enacted into law, had the following to say concerning the interpretation of that section in the light of business realities:

". . . The Congress used the terms 'retail' and 'service establishment' *in their customary meaning, in their customary application, as they were customarily understood in the various industries of the Nation.* How anyone, now, could oppose the giving of that concept to complete reality through this amendment, I fail to see, because it would simply carry out clearly what was the intention and objective of those who offered the original act, and those who voted for it and brought it to passage."

95 Cong. Rec. 12502 (1949).

Concerning the meaning of a retail sale or service, Senator Holland stated:

". . . The question is what constitutes a retail sale and what constitutes service, and in each case that

*Italics ours unless otherwise noted.

is not defined in the act, but instead is defined variably in various industries by determining what are the habits and practices in the industry.

". . .

". . . There could be various criteria which could be applied, one of which of course would be the conclusion of the trade association in the particular industry. But that is only one criterion. Others would apply. The well-settled habits of business must be applied. They will not necessarily be the same in all trades or businesses."

95 Cong. Rec. 12510 (1949).

These and others are clear expressions of Congressional intent. Contrary to Petitioner's effort to dilute the significance of these statements, the legislative history repeatedly refers to customary business practices and well settled business habits and denies any such emphasis upon mere physical separateness which is the basis of Petitioner's position.

In the cases which are discussed below, there has been a consideration of business practices in determining the meaning of the term "establishment." *In no case including* Phillips *that we have found has physical location alone been found sufficient to justify a finding that a separate establishment exists.*

D. Petitioner Itself, in Other Cases, Has Taken the Position First, That Geographical Considerations Are Not Controlling, and Second, That Business Usage and Practice Must Be Considered.

Petitioner itself has conceded, indeed urged, in actions under the Fair Labor Standards Act, that a separate physical location should not determine the existence of a separate establishment.

In *Tobin v. Aibel* (E. D. N. Y. 1952), 112 F. Supp. 156, *aff'd sub nom. Durkin v. Aibel* (2d Cir. 1953), 204 F. 2d 376, Petitioner sought an injunction against the defendant restraining the use of home workers. Petitioner urged that geographically separate locations together constituted one establishment and that each separate location did not constitute a separate establishment. In adopting Petitioner's view and in granting injunctive relief, the Court said:

> "Some minor disputes are lately resolved. In the first place the defendants argue that the maintenance by them of a separate physical establishment (at East 109th Street) is of great significance. I think it is not. It must be manifest that the purposes of the act are not so easily frustrated, as in fact they would be if the act and the regulations for the particular industry were inapplicable when the operations are conducted in two physically separate premises."
>
> *Tobin v. Aibel*, 112 F. Supp. at 158.

Petitioner's effort to distinguish this case is without substance. Petitioner states that "The decision to disregard the physical separation of the distribution point was thus no more than a practical, realistic recognition that the establishment where the knitting and partial manufacturing were performed was the same establishment . . ." (Pet. Br. 30.) *This, of course, is precisely the*

contention that Respondent argues here; namely, that the existence of an establishment should be based upon practical, realistic recognition of common business organization and practices.

And in the *Phillips* case itself Petitioner, a party in that case, advocated the position which was accepted by the Court, that business usage and practice should be considered. As stated in the summary of argument preceding the case report, the Petitioner here argued:

> *"Under common business and governmental usage* each unit of a chain store system is a separate 'establishment' and a chain store warehouse is not a 'retail establishment.'
>
> ". . .
>
> "The policy of the act as a whole strongly supports the accepted governmental and business meaning of the words."
>
> *Phillips v. Walling,* 89 L. Ed. at 1096, 1097.

That position taken in the very case upon which Petitioner principally relies here, should be contrasted with the position taken in this case where Petitioner argues directly to the contrary.

Even the Administrator's Interpretative Bulletin does not establish physical separateness as the controlling factor, but rather refers to a "distinct physical place of business" stating that this is not synonymous with "business" or "enterprise" (29 C. F. R. 1955 Supp., Sec. 779.3(b)).

Petitioner states that the decision below narrowly construes the exemption (Pet. Br. 13). On the contrary, it merely interprets the exemption in the only realistic and practical way, in the manner Congress intended, and in accordance with Petitioner's argument in the *Phillips* case. Petitioner's position would in no way effectuate the policy of the Act.

II.

Appellant Relies Principally Upon the Case of Phillips v. Walling (1945), 324 U. S. 490. To the Extent That It Is Applicable, This Case Supports Respondent's, Not Petitioner's Position.

In the *Phillips* case, decided prior to the 1949 amendments to the Fair Labor Standards Act, the company operated a chain of 49 grocery stores in two states. Quite apart from the retail stores the company operated a distributing system consisting of the ordinary wholesaling function. This operation included an office building and warehouse where the employees involved worked. The office and warehouse served all of the forty-nine stores. The Court held that the employees engaged in the wholesaling operation were not exempt as being employed in a retail or service establishment under Section 13(a)(2). The principal ground for the decision was that the wholesale function did not take on the characteristics of a retail function within the meaning of the Act. While the retail stores were exempt from the Act, the wholesale operation was not.

The defendant in that case had to contend that the entire business operation of the company constituted the retail establishment even though a division of it was a wholesale operation. The *Phillips* case decided that the term "establishment" was not necessarily the equivalent of an entire business enterprise, but could be a separate operation or division within the business.

We do not take issue here with such a holding. It appears to us to be a logical result. But we fail to see how it assists Petitioner's position.

We have not contended that Respondent's entire company operation is a single establishment. We have merely

urged that the division, of which there are 19, rather than each single building which is only a physical part of the division, is the smallest unit of the company which can be constituted an establishment upon any reasonable basis.

The *Phillips* case supports the position of Respondent. It shows that an establishment is a place of business, not just a geographically separate building or location. It specifically recognizes that normal and customary business organization is a criterion that must be considered in determining what constitutes a separate establishment.

In this respect, the Court said:

> ". . . But if, as we believe, Congress used the word 'establishment' *as it is normally used in business and in government*—as meaning a distinct physical *place of business*—petitioner's enterprise is composed of 49 retail establishments and a single wholesale establishment. Since the employees in question work in the wholesale establishment, §13(a)(2) is plainly irrelevant."
>
> *Phillips v. Walling,* 324 U. S. at 496.

This holding certainly does not mean that if the wholesale establishment or any one of the 49 retail establishments was comprised of five separate buildings that each building would be an establishment.

The quotation clearly specifies that in determining the meaning of establishment, normal business practices must be considered. This statement also shows that it is not the separate physical building which is the criterion but rather the distinct physical *place of business.* The statement not only refers in the same sentence to a place of business but also to the term establishment "as it is normally used in business and in government. . . ." This is the heart of Respondent's position, namely, that the

realities of business practices and bona fide business organization must be considered in determining what constitutes an establishment under Section 13(a) (2), and it is confirmed in the one case most heavily relied upon by Petitioner.

Even the term "physical" in the quotation is dictum since the Court's decision was based upon a separate *function*, not a separate *location*.

The Court below in this respect stated:

> "The rationale of the Phillips case lies in the fact that the warehouse function historically had been that of independent wholesalers or wholesalers independent of retail grocers. The impact of the act was not to be avoided by setting up of an 'integration' of wholesale and retail functions." [R. 152.]

Petitioner, who was also party to the *Phillips* case, contended in that case that common business and governmental usage and practice should be accepted (see 26-27, *supra*). The Court agreed. But now Petitioner changes its position and makes the rather startling argument that since the *Phillips* case "it has been settled . . . that organizational structure is irrelevant in determining what is an 'establishment' " (Br. for App. before Court below, 10, 18). We believe that its first position, that advocated in the *Phillips* case, was correct. Indeed, if customary business organization and practice—functional identity and unity—are irrelevant what factors do control? According to Petitioner it must be just physical separation, an impossible test.

The *Phillips* decision did not hold that organizational structure, functional identity and unity were not considerations. On the contrary, the decision was based upon the organizational separation of basic functions, the whole-

sale versus retail. Certainly that case did not determine even remotely that any geographically separate buildings constituted an establishment. Yet that is what Petitioner must contend. If so, a shed with a single employee must also logically be an establishment.

In this connection, the Court below stated:

> "If Phillips holds that if a business is in separate buildings, each building is necessarily an establishment then, of course, this court is wrong. It hardly seems though that Phillips goes that far" [R. 152].

The factual distinction between the *Phillips* case and the instant case are at once apparent.

In the first place, the wholesale function was a separate function and business operation distinct from the retail operation. It had functional unity and identity. It was specifically compared by this Court with the independent wholesaler in function and operation. The Court states that the employees involved were performing duties which were ". . . economically, functionally and physically like those of the independent wholesaler's employees . . ." (324 U. S. at 498.) The Court would have no occasion to refer to such factors if physical location were to be the controlling criterion.

The basis of the decision in the *Phillips* case was that there was a distinction between *functions*, not between buildings. The Court thus separated the wholesale function, a separate operating part of the business, from the retail function. In the instant case there is no such separation. The integration of the Alameda building with the division is complete.

Another clear point of distinction from the *Phillips* case is the fact that in that case the wholesaling function

was of the conventional nature, distributing goods as would be true with an independent wholesaler distributing to forty-nine retail stores. In this case, the Alameda building performs no such wholesaling function. It does not service the other warehouses either in the East Los Angeles Division or in any of the other divisions. In the organization of the company and in its operation, it is on the same level and performs the same function as do the other buildings in the Division. In no sense can it be separated from the other buildings or from the Division in the manner in which the wholesale function was separated from the retail function in the *Phillips* case.

Since the *Phillips* decision only involved the question as to whether the wholesale function was separate from the retail function for the purposes of the Act, the Court was not required to consider the relationship of one retail store to the other. For the purpose of the decision, it assumed that each was a separate business operational unit—a separate retail store or establishment. *However, the case does show that each store had a manager, separate accounts, its own record of inventory and transfers of goods, and its own records of cash deposits, that each store manager prepared his own requisitions, and that each was so located as to serve distinct competitive areas so as not to supplement each other's services* (*Walling v. A. H. Phillips* (D. Mass., 1943), 50 F. Supp. 749, 750, 751).

The opinion also shows that the wholesale function would be substantially the same whether provided by an independent wholesaler or by the wholesale operation of the same company.

The foregoing circumstances refute Petitioner's contention that the five buildings of the East Los Angeles Division are "functionally no more integral a part of the

'Divisions' than the Phillips' central office and warehouse was . . . of that Company's retail stores." (Pet. Br. 8.) Petitioner's attempted comparisons are inapposite. His statement that Respondent's warehouses "are no less functionally separate than the units of a typical chain organization" is denied by the facts (Pet. Br. 15). Even the few specific allegations made to support these large conclusions are in error.

Petitioner states, for example, that "each [warehouse] has its own crew of employees . . ." (Pet. Br. 15.) This is directly contrary to the stipulated facts which are that the working force within the Division is interchangeable not only among the various operating tasks but among the various buildings within the Division. These transfers back and forth occur regularly and frequently [Fdg. 21, R. 14, 44]. The contention that the type of warehousing and function of each of the buildings within the Division are different is also contrary to the Record (Pet. Br. 15-16). The facts show the essential function and equipment of each of the buildings to be the same, and the character of the business to be determined on a division, not a building basis [Fdg. 11, 16, R. 38-39, 41-42]. The Findings of Fact are specific that the activities of the Division could be carried on as well or better if they were all located in one building [Fdg. 16, R. 41].*

In the instant case there are five geographically separate buildings merged completely in a single operating unit,

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*As an example of the necessity of operation on a division basis W. C. Elliott, Vice President of Respondent testified:

"We cannot economically operate those five warehouses except under central or one management. For example, we have a staff or crew of men at each one of the various warehouses, and we have a crew of regular employees on each piece of equipment

all rendering the same service. Together they are the smallest unit that can be considered as a "place of business" and as a single establishment. The *Phillips* case in no way denies—indeed confirms—such a result. It is not authority for Petitioner's position here.

In the *Phillips* case the basic retailing unit was the retail store (which could consist of five buildings). The comparable basic unit in the business of Respondent is the Division.

As stated by the Court below:

> "The decision here is simply that it is possible for one business located in several buildings, neither contiguous nor widely scattered, to be one establishment and that the proprietor's unit of operation and control may be considered, in a case like this one, in determining what is an establishment." [R. 153.]

It should also be pointed out that the *Phillips* case was decided before the 1949 amendments to the Act. One of the bases for the amendment was that business realities had been ignored (95 Cong. Rec. 12502 (1949)). The text of the new section shows that functional identity and customary business organization and practices are necessary considerations in its application.

There is thus no conflict between the decision below and *Phillips*.

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which the branch owns; however, we get moving jobs for, say, a group of attorneys or lawyers who would move on one particular day, Saturday, and we would have to have more than two men on each truck, so we would take the men who are regularly stationed in the warehouses and put them on the trucks to do these moving jobs. And we find on large jobs sometimes we have to have twenty, thirty men working, maybe, for a day, and another group of that many men working at night, to move a business establishment or a retail—or, for example, Hoffman Hardware Company, or an outfit like that that moves. We have to have this reservoir of highly skilled, trained furniture movers to get the business." [R. 131-132.]

III.

Decisions Since the Phillips Case Also Confirm the Correctness of Respondent's Position.

Several decisions concerning the meaning of the term "establishment" have been rendered by various courts, both before and after the *Phillips* case was decided.

The case which is the closest in its facts to the instant case that we have found was decided as recently as May 8, 1956, after this case was decided below. It is *Mitchell v. T. F. Taylor Fertilizer Works, Inc.* (5th Cir. 1956), 233 F. 2d 284. In this case some of the employees were employed at a processing plant and others were employed at a geographically separate office. One issue was whether the plant and office constituted one establishment or separate establishments under Section 13(a)(2). The Court in finding one establishment including both the plant and office employees, specifically found that the primary test was whether the plant and office were "functionally an entity" (*id.* at 286). The contention urged there, as here, that geographical separateness was controlling, was rejected. The Court said:

> ". . . the suggestion that the right to an exemption depends upon such factors as whether part of the business is separated by a partition, or is conducted in an adjoining building, or in a building across the street or five blocks away, does not recommend itself as a rational distinction; furthermore, it does not appear to have been the intent of Congress."
>
> *Mitchell v. T. F. Taylor Fertilizer Works, Inc.*, 233 F. 2d at 285-286.

The Court below concurred with this holding [R. 152]. No other decisions we have found disagree with it.

The Court in the *Taylor* case considered the legislative history of the 1949 amendment to Section 13(a)(2). It also referred to the *Phillips* case as holding that functional separation was an important factor in determining the existence of an establishment and rejected the argument that the case required mere physical separation to control the existence of an establishment.

In *Bogash v. Baltimore Cigarette Service* (4th Cir. 1951), 193 F. 2d 291, the business of the defendant was the installation and maintenance of cigarette vending machines. The defendant maintained an office and a warehouse which was used to repair and store machines not in actual use. It was contended by plaintiffs that the office and warehouse were not part of a retail establishment but rather constituted a wholesale establishment whose employees therefore did not come within the exemption of 13(a)(2).

In finding that the *Phillips* decision did not apply and that the office and warehouse did not constitute a separate establishment, the Court said:

> "There is substance in the ruling that chain store systems combine wholesale as well as retail elements into a single system which must be separated in order that the affirmative provisions as well as the exemptions of the statute may be given effect. *But this procedure may not be carried so far by the courts as to divide a genuinely retail business into separate parts,* so as to hold that the exemptions apply only to those employees who perform the act of selling. All employees employed by a retail establishment as defined in the statute are covered by the exemption."
>
> *Bogash v. Baltimore Cigarette Service,* 193 F. 2d at 294.

Again in *Montgomery Ward & Co. v. Antis* (6th Cir. 1947), 158 F. 2d 948, *cert. denied*, 331 U. S. 811, cited by Petitioner, the Court said:

> ". . . the Phillips decision does not lay down the doctrine that all employees in a building operated as a warehouse are, by reason of that fact alone, within the coverage of the Act."
>
> *Montgomery Ward & Co. v. Antes*, 158 F. 2d at 951.

Burhans v. Montgomery Ward & Co. (S. D. N. Y. 1952), 110 F. Supp. 184, involved a factual situation similar to that involved in the instant case. A retail store had warehouse space adjacent to the store. The business expanded and the company obtained an additional warehouse approximately one mile away. The business was operated as a unit consisting of the retail store with its warehouse or stockroom and the other warehouse a mile distant. The manager was responsible for the overall operation. There was a single inventory, payroll and bank account. One union represented all of the employees under a single agreement. Record keeping was for the unit. The Court determined that the *Phillips* case was not applicable to this situation and that "The warehouse in the case at bar does not in any important particular fit the description of the warehouse in the Phillips Co. case." (110 F. Supp. at 195.)

The Court said:

> ". . . The warehouse was not physically connected with the Albany retail store, but was a mile away; however, that is not determinative of the issue. In every other way it was part and parcel of the Albany retail store. It is the use made of the warehouse, not its location, that is important. * * * But if the function of the warehouse is solely to

supplement and complete the functions of the retail store, and if the warehouse is in effect operated as a part of the retail store although not physically connected with it, the warehouse would, in my opinion, be part of the 'retail establishment'."

Burhans v. Montgomery Ward & Co., 110 F. Supp. at 196.

The Court discussed the application of various Interpretative Bulletins of the Wage and Hour Administrator as follows:

"The original Interpretative Bulletin issued by the Administrator in 1938 used the term 'retail establishment' as meaning the same thing as a retail enterprise or business. The revised Bulletin (Interpretative Bulletin No. 6, June 16, 1941) in applying the term retail establishment to a multi-unit company, held that it would not mean that the entire business was a single retail establishment. Section 36 of the revised Bulletin stated that if there was *unity of ownership of all departments in the store and if they were all operated as a single store, the enterprise taken as a whole would be considered an 'establishment'* within the meaning of Section 13(a)(2). That bulletin also held that warehouses, performing 'wholesale functions', were not included in the exemption. Finally, Interpretative Bulletin, 15 F. R. 7245 (issued after the amendment of §13(a)(2) in October 1949) specifically held that employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, are exempt as employees 'employed by' the exempt establishment *'regardless of whether or not the warehouse operation is conducted in the same building as the selling or servicing activities'*."

Burhans v. Montgomery Ward & Co., 110 F. Supp. at 196.

The Petitioner concedes the correctness of the *Burhans* case [R. 104]. To argue its inapplicability to the instant case is to ignore the facts and rationale of the *Burhans* case.

In *Duncan v. Montgomery Ward & Co.* (S. D. Tex. 1941), 42 F. Supp. 879, the company operated a retail store business in Houston, Texas. Because of limitations of space in the downtown business area, high rents and the absence of a railroad spur, the company found it necessary for reasons of economy and efficient business operation, to have warehouse space located elsewhere for the storage, handling and stocking of its merchandise. The Court found that the retail store, including the warehouse, constituted a single establishment.

The foregoing decisions are *a fortiori* for Respondent's position here since they involve situations where the warehouses were engaged in the wholesaling function of supplying and servicing the retailing part of the establishment. The Alameda building does not service the other buildings in the division or store goods for such buildings. It is the division which services its entire area; there is no breakdown according to buildings and no designation of areas covered by each. All buildings and all employees, who constantly move from one building to another, operate on a division basis. The division is the smallest unit with functional identity.

The Cases Relied Upon by Petitioner Do Not Support Its Position.

The cases cited by Petitioner do not support its position nor are they in conflict or even inconsistent with the decision of the Court below. Most of the cases involve the same type of situation with which the *Phillips* case

dealt; each cited the *Phillips* case as the basis of decision. Each involved situations where there was functional separation; in none did geographical separateness alone control. Most were also decided prior to the 1949 amendments. One was decided before the *Phillips* case decision and reached the same result. Others, in addition, placed emphasis upon the manufacturing or production, as distinguished from the distribution or retail function.

Walling v. American Stores Co. (3rd Cir. 1943), 133 F. 2d 840, was decided prior to the *Phillips* decision. The Court stated the question before it as follows:

> ". . . The question is whether the sum total of the activity of the American Stores Company constitutes a 'retail establishment' so as to exempt the entire enterprise from the mandate of the statute."
>
> *Walling v. American Stores Co.*, 133 F. 2d at 841.

This case involved eleven warehouses in five states, seven bakeries, two canneries and numerous other businesses, as well as some 2,300 stores. The Court, not surprisingly, reached the same result as was reached in the *Phillips* case namely, that the entire operation did not constitute a single establishment but that an operational division or function could constitute an establishment.

In *Walling v. Goldblatt Bros.* (7th Cir. 1945), 152 F. 2d 475, *cert. denied*, 328 U. S. 854, the warehouses again performed a wholesale function, serving a chain store system operating fourteen department stores, a drug store and bakery, and the central offices of the system. *Phillips* was quoted extensively and was the basis of the decision. It should also be noted that the State Street warehouse which principally serviced one of the retail

outlets and was located in proximity to it, was held exempt under Section 13(a)(2).

Four more of the cases cited by Petitioner* involved *Phillips* case situations. In each there was functional separation. The warehouses performed a wholesale function servicing various retail outlets. In each the court ruled that the wholesale function was not a part of the retail function and constituted a separate establishment. As stated above we have no occasion to quarrel with this result.

Mitchell v. E. G. Shinner and Company (7th Cir. 1955), 221 F. 2d 260, involved a company operating 33 retail markets in four states, the Court holding that the central office employees servicing these stores were "engaged in commerce" and that such employees were not exempt as employees of a retail establishment.

Fred Wolferman, Inc. v. Gustafson (8th Cir. 1948), 169 F. 2d 759, is inapplicable for the further reason that considerable emphasis was placed upon the producing or manufacturing type of activity involved as distinguished from the distribution or retail function. The employees were employed by a candy kitchen manufacturing candies and salad dressing which were supplied to several retail stores.

**McComb v. W. E. Wright Co.* (6th Cir. 1948), 168 F. 2d 40, *cert. denied*, 335 U. S. 854.

McComb v. Wyandotte Furniture Co. (8th Cir. 1948), 169 F. 2d 766.

Fletcher v. Grinnell Bros. (6th Cir. 1945), 150 F. 2d 337.

Armstrong Co. v. Walling (1st Cir. 1947), 161 F. 2d 515.

IV.

The Interpretation of the Term "Establishment" Under the Various Unemployment Compensation Statutes Support the Decision Below.

A very similar question concerning the meaning of the term "establishment" is presented under the various state unemployment compensation laws. While the legal question involved is, of course, different, the similarities to the issue in this case are quite clear. Both are humanitarian statutes and the determinations involved are not dissimilar. The analogy is sufficiently close to provide persuasive authority in support of the decision below. Generally these statutes provide that no unemployment compensation is payable to an employee if the reason for his lack of work is a labor dispute at the "establishment" where he works.

While the cases under these statutes reach different results based upon the factual situation involved and place a varying emphasis upon the factors considered, the results persuasively support the correctness of the decision below. There is no case which we have found which warrants the holding contended for here by Petitioner. None holds that a warehouse or other building which is merely part of a business unit or function constitutes an "establishment."

In *Spielmann v. Industrial Commission* (1940), 236 Wis. 240, 295 N. W. 1, the unemployment compensation law did not allow payment of unemployment benefits to an employee if the reason for his lack of work was a labor

dispute at the "establishment" where he worked. The case involved the Nash Company which had two plants 40 miles apart. The operations of the two plants were closely integrated, each performing related functions in the manufacture of automobiles. A single manager was in charge of the two plants. The employees in question were out of work at one of the plants because of a strike at the other plant. The Court summarized its view as follows:

> "It appears from this summary that although the two plants were forty miles apart, they were just as much a single establishment for the manufacture of automobiles as they would have been had they been in two buildings adjacent to each other, or in separate parts of the same building."
>
> *Spielmann v. Industrial Commission,* 236 Wis. at 245, 295 N. W. at 4.

In *Chrysler Corporation v. Smith* (1941), 297 Mich. 438, 298 N. W. 87, a similar result was reached. In this case, a strike at the Dodge main plant caused a lack of work in nine other plants in the Detroit area within a distance of 11 miles of each other. The employees at all of the plants were represented by the same union. It was found that the Company's operations were functionally integrated and synchronized, that the operations of the various plants were controlled from the main plant, that "the central accounting, engineering, export, mailing, production, purchasing, routing and service departments" (297 Mich. at 444, 298 N. W. at 89) were all located in or immediately adjacent to the main plant, although each

plant had individual plant managers and engineers who supervised the immediate operations of their respective plants.

The Court held that under the circumstances all of the plants constituted one establishment.

See also *Mountain States Tel. & Tel. Co. v. Sakrison* (1950), 71 Ariz. 219, 225 P. 2d 707, and *Snook v. International Harvester Co.* (Ky., 1955), 276 S. W. 2d 658.

In *General Motors Corporation v. Mulquin* (1947), 134 Conn. 118, 55 A. 2d 732, the question involved whether two plants located eighteen miles distant from each other constituted a "factory, establishment or other premises." The Court's statements in deciding this question are most relevant:

> ". . . The solution is not to be found merely in its physical isolation from Bristol, a circumstance which, as their memorandum indicates, the commissioners deemed decisive. Geographical separation is important but is by no means controlling. *Where, as here, a manufacturing corporation carries on its business in buildings at different localities, the test is whether they are so operated as to constitute a single unit;* if so, they amount to a single factory. The application of this test requires a consideration of many factors, such as the scheme of management, supervision and production of each plant; . . ."
>
> *General Motors Corporation v. Mulquin,* 134 Conn. at 130, 55 A. 2d at 738.

The foregoing cases therefore all stand for the proposition akin to that enunciated in the *Phillips* case, that the term "establishment" is not necessarily the same as the

entire business entity, with ultimate management or common ownership the criterion, but that separate divisions or separate functions can be separate establishments. Not one of the above cases, nor indeed any case we have found, has held that a separate building comprising only part of an operating unit of the company, without any organizational or employment identity other than its location, constitutes a separate establishment.

All of the cases refer to operating, functional or employment units, or places of business. They refer to customary and usual business practices and to factors which are entirely absent in the instant case. Thus, reference is made to employment, hiring and discharge practices, union representation, record keeping practices, supervisory practices, interchange of employees, seniority, management and operating practices, functional identity, and so on. If a significant number of these practices and functions are common to a particular business unit, that fact has been persuasive in finding such unit to constitute an establishment. We have found no case which has found an establishment to exist where none or only an insignificant few of these factors are applicable. In the instant case not one applies to the Alameda building. On the other hand, substantially all apply to the East Los Angeles Division. The Alameda building is therefore not an establishment within the meaning of Section 13(a)(2). Upon the basis of all the tests, the Division is the smallest unit of the Company with functional identity and which can be termed an "establishment."

V.

There Is No Justiciable Controversy Before the Court, the Case Having Become Moot.

The judgment of the Court of Appeals was entered on March 1, 1956. On April 1, 1956, the collective bargaining agreement between the Teamsters Union and the van and storage industry of Los Angeles and Orange Counties, to which Respondent was a party, expired. This agreement is negotiated on an industry basis. Members of the industry comprise a substantial majority, possibly 85 to 90%, of the van and storage business in this area. Each member individually signs identical substantive contracts. The agreement is negotiated by an industry committee consisting of five members representing some 55 companies. Respondent has only one representative on this committee.

The expired contract did not provide for overtime compensation for work on Saturdays but did for work on Sundays. The main objective of the complaint for injunction below was to require Respondent to pay overtime for work on Saturdays.

Subsequent to April 1, 1956, negotiations were carried on between the industry and the Teamsters Union and a new agreement was signed effective April 1, 1956 (a copy is set forth in the Appendix). The contract is effective until April 1, 1961, a period of five years, with wages, pension plan payments and security fund payments subject to revision upon sixty days' notice prior to April 1, 1959 or April 1, 1960. The employees involved in this action are covered by the agreement.

Among other things, the agreement provides for the payment of time and one-half the regular hourly rate for all work performed after eight hours of work on a

regular work day and on Saturday and Sunday. The agreement therefore satisfies the requirements of the Act; indeed it is more stringent in providing for overtime after eight hours in one day.

We submit that under these circumstances the issue has become moot. The overtime requirements of the Act have been met. As a result the necessary payroll records will be kept.*

We, of course, recognize that mere voluntary cessation of allegedly unlawful conduct does not deprive the Court of power to hear and determine a case. However, the decisions show the law to be that a case becomes moot where alleged violations have ceased and there is no reasonable expectation of future violations.

See:

United States v. W. T. Grant Co. (1953), 345 U. S. 629, 633.

"The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'"

United States v. W. T. Grant Co., 345 U. S. at 633;

United States v. Aluminum Co. of America (2nd Cir. 1945), 148 F. 2d 416, 448.

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*Petitioner states "Because the Company was complying with respect to these office employees at the time suit was instituted, no issue was raised as to their status." (Pet. Br. 23.) Apparently Petitioner, after investigation, was satisfied with the Company's record keeping procedures for employees who are paid overtime after 40 hours per week—as is now true with the employees involved here.

". . . The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case or controversy' may remain to be disposed of. * * * To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

United States v. Aluminum Co. of America, 148 F. 2d at 448.

In the instant case, since the decision below, Respondent has become party to a new agreement with one of the most powerful unions in the country. This agreement is for a period of five years with a reopening only on wages and pension and security fund payments in the fourth and fifth years. Furthermore, it is not just an agreement between Respondent and the Union but is in effect an agreement between the industry and the Union, the agreement being jointly negotiated and substantively identical for all members of the industry. Changes of this consequence historically and as a practical matter are by industry agreement with the Union. Respondent is not in the position of being alone in the contractual relationship. Furthermore insofar as Respondent is aware, the issue in this action is of interest to it alone among the industry. The industry is a "one-warehouse" industry by and large [R. 109]. The issue here therefore is not of general concern.

It requires, of course, no more than to point out that benefits once gained by a Union even though it is less strong than that involved here, are not readily relinquished.

Under these circumstances, we submit that there can be no reasonable expectation that present overtime provi-

sions of the Union agreement will be reduced below the requirements of the Act. The basis of Petitioner's complaint has therefore been removed.

The signing of a collective bargaining agreement with the bargaining representatives of the employees involved which complied with the Act, has been held to cause a controversy under the Act to become moot:

In *Walling v. Shenandoah-Dives Mining Co.* (10th Cir. 1943), 134 F. 2d 395, the Administrator of the Act, as here, filed an action against the defendant company to enjoin it from violating provisions of the Act. The action was dismissed by the District Court on the ground that the controversy had become moot because a new Union contract which complied with the Act had been entered into six months after the institution of the action. In affirming, the Court said:

> "The question presented is whether, under these circumstances, the administrator is entitled to an injunction as a matter of right when all violations have ceased and there is no reason to assume that the company will violate the Act in the future.
>
> ". . .
>
> ". . . if during the proceedings violations cease and the accused admittedly is in full compliance, without reason to believe that future violations will occur, the justiciable controversy disappears and the question becomes moot. It would seem to be an idle gesture to enjoin violations of the Act when they have ceased and there is no reason to fear that they will again be renewed."
>
> *Walling v. Shenandoah-Dives Mining Co.*, 134 F. 2d at 396, 397-98.

Again in *N. L. R. B. v. Delaware-New Jersey Ferry Co.* (3rd Cir. 1937), 90 F. 2d 520, the Court was petitioned by the National Labor Relations Board to enforce the action of the Board requiring the defendant to bargain collectively with the Union. Thereafter the defendant entered into a contract with the Union. The Court dismissed the petition upon the grounds that the case was moot. The Court stated:

> "The proceeding began with a complaint of unfair practices charged to the respondent. The Board has made its findings sustaining the complaint. Ordinarily nothing would remain to be done except to enforce these findings. The questions sought to be raised have become, however, practically moot. There is now no controversy; no complaint; no grievance. All which is left is the abstract question of the right of a labor union official to negotiate with the respondent employer on behalf of the engineer employees concerned, for a contract of employment. The engineers have disposed of any controversy there may have been by themselves unanimously making a contract on terms acceptable to them with the employer."
>
> *N. L. R. B. v. Delaware-New Jersey Ferry Co.*, 90 F. 2d at 520.

Therefore, under the circumstances, we believe that no justiciable controversy is before the Court, the case having become moot.

Conclusion.

For the foregoing reasons, we urge that the decision of the United States Court of Appeals for the Ninth Circuit and of the District Court are correct and should be affirmed.

Respectfully submitted,

HOMER D. CROTTY,
Attorney for Respondent.

WILLIAM FRENCH SMITH,
WILLARD Z. CARR, JR.,
GIBSON, DUNN & CRUTCHER,
Of Counsel.

Dated: December 20, 1956.

APPENDIX.

Agreement

THIS AGREEMENT is between Bekins Van & Storage Co., hereinafter referred to as the Company, and Local Union No. 389, affiliated with the I.B. of T.C.W. & H. of A., hereinafter referred to as the Union.

WITNESSETH:

ARTICLE I. DESIGNATION OF BARGAINING AGENCY AND JURISDICTION

Section 1: The Company recognizes the Union as the sole and exclusive bargaining agency for all employees within the jurisdiction of the Local Union described as follows: All truck drivers, packers, craters, order fillers, checkers, warehousemen, loaders, helpers and working foremen.

Section 2: Whenever the Company requires new or additional employees for work covered by this Agreement, the Company shall first call upon the Union. The Company may then select between candidates proposed by the Union and candidates obtained from any other source whatsoever and such selection shall be made upon merit and ability and without consideration to membership or non-membership in the Union. All employees covered by this Agreement and all employees subsequently hired must become and remain members of the Union in good standing within thirty-one (31) days of date of hire or date of execution of this Agreement, whichever is later, as a condition of employment.

Section 2-a: Upon notice by the Union, confirmed by letter, of failure on the part of any individual to complete membership in the Union or failure to continue pay-

ment of dues to the Union, the Company shall, within five (5) days, replace such employee. Such replacements shall be employed in accordance with the provisions of this Agreement applying to new employees.

Article II. The Working Day

Section 1: New help without previous experience in the industry here or elsewhere may be employed for a period of thirty (30) calendar days at an apprentice rate of ten (10) cents per hour below the lowest rate for the classification in which hired.

Section 1-a: New help with previous experience in the industry here or elsewhere may be employed at the regular rate for a period of thirty (30) calendar days before becoming regular employees.

Section 1-b: Regular employees shall be those who have been employed for a period of thirty (30) calendar days, and shall be advised in advance when there is no work for them, otherwise they are guaranteed eight (8) hours pay for each day worked, Monday through Friday, and four (4) hours pay for work on Saturday. Notice may be given by bulletin board or through employee phoning dispatcher.

Section 1-c: When regular employees are ordered to report for duty they shall be guaranteed eight (8) hours pay for each day worked, Monday through Friday, and four (4) hours pay for work on Saturday, at rates hereinafter agreed to except in cases of lay-off at the employee's request.

Section 2: Casual labor shall be guaranteed the regular work day of eight (8) hours, providing that if they are dismissed after working a lesser number of hours they shall receive pay at the rate of time and one-half for all

hours worked, and are guaranteed at least two (2) hours pay.

Section 3: All men are to be compensated from the time they start working on any day until discharged from duty at the end of the day, excepting time out for meals. The meal period shall be a maximum of one (1) hour per meal but may be less at the Company's discretion.

Section 4: For regular employees, in addition to their regular hourly rate, the company shall pay or provide transportation from warehouse or other company establishment at which employees are ordered to report to any other place of work during the day and return to starting place. Any exception shall only be by prior mutual agreement between the Union and the Company confirmed subsequently by letter.

Section 5: Any employee who is transferred during the day to work carrying a lower rate of pay shall not have his pay reduced to that of the lower classification.

Section 5-a: When employees are raised during the day from a lower classification to a higher one, payment will be made at the rate applicable for the time worked in each classification, except in instances where helpers are assigned to work in the warehouse to complete their guaranteed day's work.

Section 6: An employee regularly assigned to the warehouse shall be a warehouseman and receive warehouseman's pay as provided in this Agreement.

Section 7: Any employee whose earning capacity is limited because of a physical condition, or any other infirmities, may be employed at a wage scale below that herein provided, subject to prior special agreement with the Union in each case.

Article III. Overtime

Section 1: For all work performed Monday through Friday the employees shall receive the overtime rate of one and one-half (1½) times the regular hourly rate after eight (8) consecutive hours of work, or in any event for hours worked before 7:00 A.M. and/or after 6:00 P.M. on household moves and before 7:00 A.M. and/or after 9:00 P.M. on commercial or office moves.

Section 1-a: For all work performed on Saturday, effective June 1, 1956, the employees shall receive the overtime rate of one and one-half (1½) times the regular hourly rate, subject to a minimum of four(4) consecutive hours of work.

Section 1-b: For all work performed on Sunday the employees shall receive the overtime rate of one and one-half (1½) times the regular hourly rate subject to a minimum of eight (8) consecutive hours of work.

Section 1-c: Any exceptions to Article III shall only be by prior mutual agreement between the Union and the Company, confirmed subsequently by letter.

Article IV. Holidays

Section 1: The following days are agreed upon as regular holidays for all employees covered by this agreement:

New Year's Day	Labor Day
Memorial Day	Thanksgiving Day
Fourth of July	Christmas Day

A regular employee who is on the payroll of the Company for a period of thirty (30) calendar days immediately preceding one of the holidays specified above and who works on the regular work day immediately preceding and following such holiday (unless excused by the Com-

pany) shall be paid for such holiday on the basis of eight (8) hours at the applicable regular rate, if he does not work on such holiday, provided, however, that if the employee is not available for work due to a bona fide illness of not more than thirty (30) days duration, he shall receive such holiday pay. The holiday shall also be paid if it falls in a period when an employee is on vacation.

If employee works on one of the above holidays, he shall be paid the overtime rate of one and one-half (1½) times the regular hourly rate for time worked only on such holiday in addition to holiday pay.

Section 1-a: A regular employee who is laid off or terminated by the Company less than fifteen (15) calendar days prior to a holiday shall be entitled to holiday pay and shall receive pay for that holiday at the time of layoff or termination, except in case of severance of employment, either voluntarily or by discharge for cause.

Article V. Discharge

Section 1: The Company may discharge any employee for cause, such as drinking while on duty, dishonesty, or failure to perform his work in a satisfactory manner.

Article VI. Vacations

Section 1: All employees covered by this Agreement shall be entitled to one (1) week vacation with seven (7) days pay after one (1) year of continuous service. Employees with two (2) years or more of continuous service shall be entitled to two (2) weeks vacation with fourteen (14) days pay. Employees with fifteen (15) years or more of continuous service shall be entitled to seventeen (17) days vacation with pay.

Section 1-a: Vacation pay shall be computed at the employee's regular straight time hourly rate.

Section 1-b: In case of severance of employment either voluntarily or by discharge, except in case of proven dishonesty, employees shall be entitled to pay in lieu of vacation pro-rated as follows: Employees who have worked from one (1) to two (2) years shall receive one twelfth (1/12) of fourteen (14) days pay for each full thirty (30) days over six (6) months since the last anniversary date of employment. Employees who have worked two (2) years or more shall receive two twelfths (2/12) of fourteen (14) days pay for each full thirty (30) days over six (6) months since the last anniversary date of employment. Employees with fifteen (15) years or more shall receive two twelfths (2/12) of seventeen (17) days pay for each full thirty (30) days over six (6) months since the last anniversary date of employment.

Section 1-c: Arranging vacations, the Company may specify periods during which no vacations may be taken on account of rush work. Vacations will be taken as far as possible during slack periods.

Section 1-d: Seniority shall prevail in choice of vacations:

Article VII. Seniority

Section 1: Seniority shall consist of length of continuous service with the Company and such continuity shall not be broken by reason of leaves of absence, bona fide sickness or injury, or layoffs not to exceed one hundred twenty (120) days.

Ability to do the work being equal, the employee with the least seniority shall be the first laid off in the event of the reduction of the working force, and the last employee laid off shall be the first rehired.

Article VIII. Arbitration

Section 1: In the event of any dispute between the Company and the Union as to the meaning or interpretation of any provision of this Agreement, or in the event of any alleged grievance, the parties hereto shall exercise every amicable means to settle or adjust such dispute or grievance; but in the event of failure to accomplish the settlement or adjustment thereof such dispute or grievance shall be referred to a board of three (3) arbitrators, and their majority decision shall be binding upon the parties involved.

The Board of Arbitration shall consist of one (1) representative to be selected by the Company and one (1) representative to be selected by the Union. The representatives so selected shall meet within three (3) days of their appointment and select a third member of the Board, who, when so selected, will act as Chairman.

Upon failure of the representatives so selected to agree upon the Chairman within a further three-day period, both parties agree that the American Arbitration Association or Federal Mediation and Conciliation Service shall be called upon to submit a list of seven (7) names from which, by alternate crossing off, the Chairman shall be selected within ten (10) days.

The Board, when selected, shall meet within a further five-day period at which time both parties shall present their cases, and unless a mutual agreement as to extension of time is agreed upon by both parties, it shall be mandatory upon the Board to render its findings and decision within five (5) days after conclusion of hearings.

Section 1-a: The expense of the Board of Arbitration shall be borne equally by the parties hereto.

Section 1-b: Pending and following final adjustment of any dispute or grievance, there shall be no suspension of work by strike, work stoppage, slowdown, sitdown, or lockout, provided that this restraint of economic action will not be binding upon the Union or the Company if the other party refuses to arbitrate or to be governed by the majority decision of the Arbitration Board.

Section 2: The Union is not in favor of sympathetic strikes and will do everything within its power to prevent them.

Article IX. General Conditions

Section 1: Upon request of the Union on behalf of a member whose time or pay is questioned, the Company agrees to submit the payroll records of such employees for audit by an agent of the Union.

Section 2: No employee shall suffer a reduction in the rate of pay because of signing of this Agreement.

Section 3: Nothing in this Agreement shall in any way be construed as altering, changing or modifying any of the provisions of State or Federal law with respect to the employees concerned hereunder. In the event that State or Federal regulation or legislation shall in any manner conflict with the terms of this Agreement, said conflict shall not alter or change any of the remaining provisions herein, but such regulations or legislation shall become a part of this Agreement.

Article X. Wage Scale

Section 1: The following shall be the minimum of wages paid for local operations:

HOURLY WAGE RATES

	Effective Apr. 1, 1956		Effective Apr. 1, 1957		Effective Apr. 1, 1958	
	Reg. Rate	Overtime Rate	Reg. Rate	Overtime Rate	Reg. Rate	Overtime Rate
All Drivers	$2.15	$3.225	$2.24	$3.36	$2.33	$3.495
Packers	2.15	3.225	2.24	3.36	2.33	3.495
Craters	2.15	3.225	2.24	3.36	2.33	3.495
Order Fillers	2.15	3.225	2.24	3.36	2.33	3.495
Warehousemen	2.15	3.225	2.24	3.36	2.33	3.495
Loaders	2.15	3.225	2.24	3.36	2.33	3.495
Helpers	2.00	3.00	2.09	3.135	2.18	3.27
Working Foreman	2.25	3.375	2.34	3.51	2.43	3.645

Winch truck operators (when operating winch) shall receive an additional fifteen cents (15¢) per hour except when handling household goods.

All salaried employees in the above classification shall receive an equivalent increase to the increases herein provided.

ARTICLE XI. LONG LINE PROVISIONS

Section 1: The following shall be the minimum of wages paid for long line operation.

HOURLY WAGE RATES

	Effective Apri. 1, 1956		Effective Apr. 1, 1957		Effective Apr. 1, 1958	
	Reg. Rate	Overtime Rate	Reg. Rate	Overtime Rate	Reg. Rate	Overtime Rate
Drivers	$2.30	$3.45	$2.39	$3.585	$2.48	$3.72
Driver's Helpers	2.20	3.30	2.29	3.435	2.38	3.57

(a) When a long line driver or helper has worked in excess of sixty (60) hours in any calendar week, he shall be paid at the rate of time and one-half for all work performed in excess of sixty (60) hours.

(b) In addition to the above, the following conditions shall apply to long line hauls only:

(1) It is agreed that any job requiring the driver or crew to be away from home overnight or out of

the city after midnight shall be a long line haul, and work on the job shall be paid for at the rate herein specified.

(2) When two men are used on an operation, one man shall be designated as the driver and shall receive the applicable driver's rate for all time worked. The second man, or helper, shall receive the applicable driver's rate for all time spent driving, and for all other time worked shall receive not less than the applicable helper's rate. If for any reason it becomes necessary during a trip to designate the helper as the man responsible for the operation of the trip, he shall receive the rate applicable to drivers for all time worked.

(c) When drivers and helpers are held away from their home overnight or for their rest period, they shall be compensated on the following basis:

(1) For the first sixteen (16) hours of each layover period, no compensation. For the next eight (8) hours at the applicable regular hourly rate of pay. For the next sixteen (16) hours, no compensation. For the next eight (8) hours, at the applicable regular hourly rate of pay, and continuing on the same basis for each twenty-four (24) hour period of continuing layover, with the exception of layovers falling on Sundays and Holidays.

(2) All drivers and helpers shall be compensated at their regular hourly rate of pay after eight (8) hours of layover time at any shuttle point not located in a city or town with sleeping accommodations.

(3) For any and all subsequent work days of twenty-four (24) hours each, all drivers and helpers shall receive a minimum day's pay of eight (8) hours, or be deadheaded to their home terminal or breaking point.

(4) All deadheading shall be paid for at the regular hourly rate of pay, with a maximum of eight (8) hours deadheading time in any twenty-four (24) hour period. Any unused portion of the work day covered by a minimum of eight (8) hours pay can be used as a portion of the deadheading time.

(5) When a layover falls on Sunday, drivers and helpers shall receive layover pay, in addition to overnight subsistence, as follows:

a. Effective April 1, 1956, five dollars and fifty cents ($5.50).

b. Effective June 1, 1956, six dollars ($6.00).

(6) All drivers and helpers shall be compensated from the time they are ordered to report for duty at home terminal.

(7) The following sum per night for subsistence shall be paid drivers and helpers when they are away from home terminal:

a. Effective April 1, 1956, five dollars and fifty cents ($5.50).

b. Effective June 1, 1956, six dollars ($6.00).

c. Effective April 1, 1957, six dollars and twenty-five cents ($6.25).

d. Effective April 1, 1958, six dollars and fifty cents ($6.50).

Article XII. Security Fund Payments

Section 1: The Moving and Storage industry of Southern California and the Union have established a Trust Fund designated as the Moving and Storage Industry Teamsters Security Fund, for the purpose of providing for the benefit of employees and their dependents insurance benefits for any or all of the following: Life, Accident, Disability and Sickness Insurance, and Medical and Hospital Expenses. Said Trust Fund is administered by a Board of Trustees on which the employees and the employers are equally represented.

Subject to change in the amount of the payment as hereinafter provided, the Company shall pay into said Trust Fund the sum of Eleven Dollars and Five Cents ($11.05) for the month of April, 1956, and commencing May 1, 1956, the sum of Twelve Dollars and Forty-three Cents ($12.43) per month for each regular employee working under this Agreement. Such payments shall include provisions for both employees' and dependents' benefits. Such payments shall be made in addition to all wages and other compensation provided in this Agreement, and such payments shall be made without any deduction for any purpose whatsoever. Such payments shall be due on the first day of the calendar month, and shall be paid not later than the tenth of the same month. The Union and the employees shall have the same rights and remedies in the event of the failure of the Company to make such payments as presently exist with respect to the non-payment of wages. The liability of the Company for the monthly payments herein provided shall be limited to payments on behalf of its own employees.

It is the intention of the Union and the Company that the benefits provided for employees and their dependents by the Moving and Storage Industry Teamsters' Security

Fund as of the effective date of this Agreement shall be maintained until April 1, 1957. Thereafter the amount of the monthly payments shall be the amount determined by the Board of Trustees to be necessary to maintain the same or equal benefits.

A regular employee, with respect to whom such monthly payments are required to be made shall mean:

(a) Any employee on the payroll of the Company on the first day of the calendar month who has been on the payroll of the same Company continuously during the preceding calendar month; or

(b) Any employee on the payroll of the Company on the first day of the calendar month who had been employed by any other Company within thirty (30) days of his date of employment and covered by the Moving and Storage Industry Teamsters' Security Fund.

The Company shall not be required to make such monthly payment for an employee who is absent from work on the first day of the calendar month as a result of illness or accident, whether occupational or otherwise.

Article XIII. Pension Plan Payments

Section 1: The Western Conference of Teamsters Pension Plan has been established to provide certain retirement, termination and death benefits to employees. The Plan and Pension Trust are governed by an equal number of Union and Employer Trustees.

Section 2: The Company agrees that, effective December 1, 1956, and continuing until December 1, 1957, it will pay into the Western Conference of Teamsters Pension Trust Fund for each employee covered by the terms of this Agreement the sum of five cents (5¢) for

each hour for which compensation is paid to him to a maximum of eight dollars and sixty-five cents ($8.65) per calendar month for each such employee, said amounts to be computed monthly.

Section 3: The Company agrees that, effective December 1, 1957, it will pay into the Western Conference of Teamsters Pension Trust Fund for each employee covered by the terms of this Agreement the sum of ten cents (10¢) for each hour for which compensation is paid to him to a maximum of seventeen dollars and thirty cents ($17.30) per calendar month for each such employee, said amounts to be computed monthly.

Section 4: The total amount due for each calendar month shall be remitted in a lump sum not later than ten (10) days after the last business day of such month. The Company agrees to abide by such rules as may be established by the Trustees of said Trust Fund to facilitate the prompt and orderly collection of such amounts, and the accurate reporting and recording of such hours and such amounts paid on account of each member of the bargaining unit. Failure to make all payments herein provided for, within the time specified, shall be a breach of this Agreement.

Article XIV. Term of Agreement

Section 1: This Agreement shall become effective the 1st day of April, 1956, except as otherwise provided herein, and shall remain in effect until April 1, 1961. Wages, Pension Plan payments and Security Fund payments will be subject to revision April 1, 1959, and April 1, 1960, provided either party gives sixty (60) days notice in writing to the other of its desire to modify these conditions prior to April 1, 1959, or April 1, 1960.

Section 2: If agreement upon modification of these conditions has not been reached sixty (60) days after the giving of any such sixty (60) day notice by either party, it shall not be a violation of this Agreement for the Union to take economic action in support of its demands.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
LOCAL UNION No. 389

By RAY W. FRANKOWSKI

EMPLOYER: Bekins Van & Storage Co.

Date: July 27, 1956

By DANIEL P. BRYANT

INDEX

	Page
I. The case is not moot	2
II. The commercial warehousing services of the Alameda warehouse are not "retail" under Section 13 (a) (2)	6

CITATIONS

Cases:

Carpenters Union v. *N. L. R. B.*, 341 U. S. 707	6
Consolidated Edison Co. v. *N. L. R. B.*, 305 U. S. 188	6
Federal Trade Commission v. *Goodyear Co.*, 304 U. S. 257	3
Mitchell v. *Joyce Agency, Inc.*, 348 U. S. 945	2
Mitchell v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427	2
N. L. R. B. v. *Bell Aircraft Corp.*, 206 F. 2d 235	6
N. L. R. B. v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, rehearing denied, 337 U. S. 950	6
N. L. R. B. v. *Delaware-New Jersey Ferry Co.*, 90 F. 2d 520, certiorari denied, 302 U. S. 738	5
N. L. R. B. v. *C. C. Lang & Son, Inc.*, 212 F. 2d 436	6
N. L. R. B. v. *Mexia Textile Mills*, 339 U. S. 563	6
N. L. R. B. v. *Taormina*, 207 F. 2d 251	6
N. L. R. B. v. *Trimfit of California*, 211 F. 2d 206	6
N. L. R. B. v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004	6
N. L. R. B. v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947	6
National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261	3, 6
United States v. *Aluminum Co. of America*, 148 F. 2d 416	5
United States v. *W. T. Grant Co.*, 345 U. S. 629	3, 4, 5
United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290	3
Walling v. *Haile Gold Mines*, 136 F. 2d 102	5
Walling v. *Helmerich & Payne*, 323 U. S. 37	2, 4, 5
Walling v. *Mid-Continent Pipe Line Co.*, 143 F 2d 308	5
Walling v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331	4
Walling v. *James V. Reuter, Inc.*, 321 U. S. 671	2, 3, 4

Cases—Continued Page
Walling v. *Shenandoah-Dives Mining Co.*, 134 F. 2d 395 5
Statutes:
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.*:
Section 13 (a) (2) 1, 6, 7, 9
Miscellaneous:
144 A. L. R. 460–462 6
Frederick, *Public Warehousing*, pp. 15–16 8

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 122

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BEKINS VAN AND STORAGE COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF LABOR

While most of the arguments advanced in respondent's brief are identical to those presented in its brief in opposition to the petition for certiorari, and were, therefore, anticipated and discussed in petitioner's main brief on the merits, respondent makes two contentions not hitherto made directly or explicitly. The *first* is that the case is moot, and the *second* is that the commercial warehousing services of the Alameda warehouse may be "retail" within the meaning of the Section 13 (a) (2) exemption. Both of these contentions are wholly without merit, the second contention, indeed, having been foreclosed by express pre-trial stipulation between the parties.

I

THE CASE IS NOT MOOT

The contention that the case is moot rests upon the same "subsequent developments" (a recently-executed agreement with the union) that respondent relied upon as a reason for its opposition to the petition for certiorari (Respt's Br. in Opp., pp. 7–8). Although in its brief in opposition respondent refrained from asserting explicitly that the union agreement rendered the case moot, it relied on precisely the same facts and arguments for its contention that the case was no longer of sufficient significance to warrant review by this Court (Br. in Opp., pp. 8, 38). This contention was answered in detail in petitioner's reply to the brief of respondent in opposition (pp. 2–10).

We submit that the factual and legal answer presented in that reply establishes that this case is not moot. As there pointed out, even if it be assumed that the effect of the subsequent union agreement would bring respondent into substantial compliance with the Act,[1] it is settled beyond doubt that the discontinuance of violations by voluntary agreement (*Walling* v. *Helmerich & Payne*, 323 U. S. 37), or by completion of the work involved in the particular litigation (*Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427), or by dissolution of the corporate employer (*Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671; *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S.

[1] The reasons for questioning the adequacy of the union agreement to effectuate compliance with the requirements of the Act are set forth in petitioner's reply to the brief for respondent in opposition, pp. 6–10.

945) does not moot the controversy. See also *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. As also pointed out in our reply (pp. 4–5), such subsequent developments particularly do not moot a case like the instant one where there is a "public interest in having the legality of the practices settled" (*United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632), and a ruling of mootness would frustrate the Government's right of "pursuit to completion of the prescribed appellate procedure" (*Reuter*, 321 U. S. at 676).

Respondent's reliance upon *United States* v. *W. T. Grant Co. supra*, is plainly misplaced. Not only did that decision explicitly hold that "the actions [there involved] *were not moot*" (345 U. S. at 635, emphasis added), but the following summary of the principles and authorities is directly applicable to the instant case (345 U. S. at 632):

> * * * [The] voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i. e., does not make the case moot. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944). A controversy may remain to be settled in such circumstances. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (1945), e. g., a dispute over the legality of the challenged practices. *Walling* v. *Helmerich & Payne, Inc., supra; Carpenters Union*

> v. *Labor Board,* 341 U. S. 707, 715 (1951). The defendant is free to return to his old ways. This, *together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.* * * * [345 U. S. at 632, emphasis added].

The holding of the *W. T. Grant* decision was that *"although the actions were not moot,* no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief" (345 U. S. at 635–636, emphasis added). The instant case, unlike *W. T. Grant,* does not present the question of the trial court's discretion to grant or deny relief. Respondent here clearly had not discontinued the challenged conduct at the time of the trial court's decision, and the question of the exercise of discretion to grant relief was neither presented nor decided in that court. Moreover, in significant contrast to the *W. T. Grant* case, the decision below decided, on its merits, the controversy between the parties over the legality of the challenged conduct—conduct which respondent still vehemently contends is legal (Respt's. Br., pp. 12–45). In these circumstances, there remains a justiciable controversy requiring "pursuit to completion of the prescribed appellate procedure" (*Reuter, supra*), particularly since there is a substantial "public interest in having the legality of the practices settled" (*W. T. Grant, supra*) and in correcting an erroneous lower court decision upon which, otherwise, respondent and others may rely in the future. See *Walling* v. *Helmerich & Payne,* 323 U. S. 37, 43; *Walling* v. *Mutual Wholesale Food*

& Supply Co., 141 F. 2d 331, 335 (C. A. 8); *Walling* v. *Haile Gold Mines*, 136 F. 2d 102, 105 (C. A. 4).

None of the other decisions on which respondent relies (pp. 47–50) affords any support for its contention of mootness. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. A. 2), indeed, supports the opposite conclusion, citing "plentiful authorities" for its ruling that the cessation of the conduct there challenged did *not* moot the controversy (at 448). In *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. 2d 395 (C. A. 10), as in the *W. T. Grant* case, the decision related solely to the discretion of the trial court to grant or deny relief where it was conceded that the challenged conduct had ceased prior to the trial court's decision and that there was no reason to doubt compliance with the law in the future. In addition, that decision was rendered almost two years prior to this Court's decision in *Walling* v. *Helmerich & Payne, supra*, and a year before the Tenth Circuit's holding in *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308, which in effect repudiated any possible implications of mootness there might have been in the *Shenandoah-Dives* decision. In *Helmerich & Payne*, this Court held that the voluntary cancellation of challenged employment contracts and the substitution of contracts which were concededly legal did not moot the case, where the decision below was "on the merits" and respondent had "consistently urged the validity of" its past conduct (323 U. S. at 43).

Respondent's reliance on *N. L. R. B.* v. *Delaware-New Jersey Ferry Co.*, 90 F. 2d 520 (C. A. 3), certio-

rari denied, 302 U. S. 738, overlooks that opinion's plain inconsistency with the long line of *subsequent* decisions of this Court and of the Courts of Appeals, which have regularly held that voluntary compliance, changes in circumstances, and settlement by contract or otherwise, do not moot orders of the Labor Board. *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *Carpenters Union* v. *N. L. R. B.*, 341 U. S. 707, 715; *N. L. R. B.* v. *Mexia Textile Mills*, 339 U. S. 563, 567; *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225, n. 7 rehearing denied, 337 U. S. 950; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 230; *N. L. R. B.* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947 (C. A. 2); *N. L. R. B.* v. *Bell Aircraft Corp.*, 206 F. 2d 235, 238 (C. A. 2); *N. L. R. B.* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1007 (C. A. 3); *N. L. R. B.* v. *Taormina*, 207 F. 2d 251, 255 (C. A. 5); *N. L. R. B.* v. *C. C. Lang & Son, Inc.*, 212 F. 2d 436 (C. A. 6); *N. L. R. B.* v. *Trimfit of California*, 211 F. 2d 206, 208 (C. A. 9); 144 A. L. R. 460–462.

II

THE COMMERCIAL WAREHOUSING SERVICES OF THE ALAMEDA WAREHOUSE ARE NOT "RETAIL" UNDER SECTION 13 (a) (2)

Respondent, in the "Preliminary Statement" of its Argument, asserts that most of its warehouses, and not Alameda alone, "regularly engage in handling commercial goods" (p. 13) and that, therefore, Alameda is no less a "retail establishment" because of the commercial nature of its warehousing than are the other warehouses. To support this assertion,

respondent contends (p. 14) that commercial warehousing services, as well as non-commercial warehousing, "can be retail" under the amended Section 13 (a) (2). This contention, which seems to imply that Alameda, even if regarded as a separate establishment, might qualify for the exemption, is directly in conflict with the undisputed, and expressly stipulated fact, that the "percentage tests" of the exemption "are *not* met in the case of Alameda if Alameda alone is a single 'establishment' within the meaning of Section 13 (a) (2) * * *" (Stip. XII, R. 18, emphasis added). On the basis of this pre-trial stipulation, which was made a part of the record (R. 139), the trial court found that "Such tests [including specifically the test that 75 per cent of its sales of services must be "not for resale and * * * recognized as retail * * * in the particular industry"] are not met in the case of the Alameda warehouse considered separately" (Fdg. 2, R. 34).

The plain import of this stipulation and finding is that, admittedly, more than 25 percent of the annual dollar volume of services at Alameda is *not* retail; this made it unnecessary to adduce evidence on the question whether or not the commercial storage services at Alameda are "recognized as retail" in the warehousing industry. As respondent undoubtedly was and is well aware, any contest on that point, which it now seeks to raise, would have entailed extensive and burdensome proof, as well as a thorough presentation and consideration of the voluminous legislative history on the 1949 amendments to the exemption. It was deliberately decided by the parties to

foreclose a contest on this issue by the pre-trial stipulation, the evident basic premise of which was that the commercial warehousing at Alameda was *not* retail within the meaning of the amended exemption.

Although the record does not disclose in detail the precise nature of Alameda's non-retail functions (since the stipulation made such evidence unnecessary), the record, as well as the stipulation, refutes respondent's suggestion that the nature of Alameda's functions is no different from, and no less retail than, the functions at respondent's other warehouses. The record shows that, unlike many of respondent's other warehouses which are located in residential areas serving essentially household storage needs, the character of Alameda's business is determined by its location in an area which "consists entirely of an industrial and commercial neighborhood" (Fdg. 16, R. 41). The record also shows that Alameda engages substantially in the general "storage of commercial goods" such as "phonographs and radios and washing machines, and things like that" for the business concerns located in its environs which consists "entirely of * * * heavy industrial and commercial" enterprises (Stip. R. 18, Fdg. 16, R. 41, 129). That this type of storage warehousing is not only non-retail but is in the category of functions performed by the "independent wholesaler or middle man" is confirmed by the standard references on the warehousing business. Warehousing of commercial goods is known in the trade as warehousing of "general merchandise," as distinguished from "household goods and furniture." See Frederick, *Public Warehousing,* pp. 15–16. "General

merchandise warehouses" are defined as those used "for *the storage of merchandise and commodities by manufacturers or other shippers until the goods are required by retailers, distributors, or industrial and household consumers.* * * * General merchandise warehouses are frequently referred to as distribution warehouses. *They really act as service links between the producer and consumer." Ibid.* (Emphasis added.)

Obviously, the fact that respondent's admittedly exempt warehouses may also engage, to some extent, in such non-retail commercial storage in no way affects the non-exempt status of Alameda, since Section 13 (a) (2) by its express terms makes the exemption depend upon the proportionate *percentages* of the retail and non-retail services of the particular establishment.

In these circumstances, we believe it would serve only to burden the Court unnecessarily if we should undertake a full answer to respondent's cryptic contention that commercial warehousing, as well as non-commercial warehousing, "*can* be retail" (emphasis added). Not only are the isolated excerpts which respondent quotes from the legislative history (pp. 14-15) taken out of the context of other pertinent and lengthy legislative comment and debate, but the statutory language itself, as well as the very excerpts quoted by respondent, make it evident that commercial services could not be found to be "retail" in the absence of proof that such services are "recognized as retail * * * in the particular industry" (Section 13 (a) (2)). This is the very proof which

respondent waived by the pre-trial stipulation, in apparent recognition that it had the burden of proving the application of the exemption. Respondent's suggestion at this stage that it might be able to prove that Alameda's commercial warehousing is "recognized as retail" is patently inappropriate, and serves only to confuse and obscure the sole issue before the Court, *i. e.*, whether Alameda is a separate "establishment" within the meaning of the exemption.

Respectfully submitted.

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